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IN THE

Supreme Court of the United States

October Term 1979

No. 79-1950

SHIRLEY BERK, Individually and as Executrix of the Estate of Oscar Berk,

Petitioner,

vs.

COUNTY OF LOS ANGELES and CITY OF TORRANCE,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of California.

JERROLD A. FADEM,
MICHAEL M. BERGER,
of FADEM, BERGER,
& NORTON,
A Professional Corporation,
501 Santa Monica Boulevard,
Suite 600,
P.O. Box 2148,
Santa Monica, Calif. 90406,
(213) 451-9951,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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No. .....

SHIRLEY BERK, Individually and as Executrix of the Estate of Oscar Berk,

Petitioner,

vs.

COUNTY OF LOS ANGELES and CITY OF TORRANCE,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of California.

Petitioner Shirley Berk[1] respectfully prays that a Writ of Certiorari issue to review a judgment and opinion of the California Supreme Court.

The California Supreme Court's opinion not only confiscates Mrs. Berk's property for public use without the payment of *any* compensation, but it does so in a manner which:

- deprives Mrs. Berk of due process of law, by retroactively changing a long-standing rule of property; and
- conflicts with the jurisdiction of Federal Courts proceeding under the Bankruptcy Act, by holding that

[1]Mrs. Berk brings this action both individually and as Executrix of the Estate of her husband, who died shortly after the trial court's confiscation order.

property which is in the custody of a Federal bankruptcy court may be transferred from the bankrupt by operation of State law — even though the Federal court has enjoined any dilution of the bankrupt's property interests.

Opinion Below.

The opinion of the California Supreme Court (App. A) is reported as *County of Los Angeles v. Berk* [consolidated with *City of Torrance v. Berk*] (1980) 26 Cal.3d 201, 161 Cal.Rptr. 742, 605 P.2d 381.

Jurisdiction.

The judgment of the California Supreme Court (App. B) was filed and entered January 24, 1980. A timely Petition for Rehearing was denied March 13, 1980 (App. C). When rehearing was denied, the opinion was modified (App. D).

A copy of the California Court of Appeal's January 19, 1979 opinion is Appendix E. Copies of the judgments in the *County* and *Torrance* cases are Appendices F and G respectively.

This Court's jurisdiction is invoked pursuant to 28 USC §1257(3).

Questions Presented.

1. When a U.S. District Court (applying Federal bankruptcy law) takes the property of a bankrupt *in custodia legis*, and issues an injunction barring anyone from altering the status quo by diluting the bankrupt's assets, does a State court violate Federal law by holding that property subject to such an injunction has been transferred from the bankrupt by being "impliedly dedicated" by the bankrupt to the general public during the Federal court's custody, while the Federal injunction was in effect?

2. When a state Supreme Court reverses a long-standing rule of property which sets up the requirements for establishing the prescriptive (or "implied") dedication of private property to public use, and then the courts of that state retroactively apply the new rule in such a manner that property which was *private* under the old rule, *ipso facto, eo instanti*, becomes *public* under the new rule — without the payment of *any* compensation to the owner, and without any opportunity for private property owners to adjust their actions to fulfill the requirements of the new rule — has the owner been deprived of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Can a state, without violating the Fifth and Fourteenth Amendments to the United States Constitution, take private property for public use without compensation, by means of a sudden change in judicially declared property law?

4. Is a litigant afforded due process of law when a state court, without hearing evidence, indulges in presumptions about the effect of human behavior — which have no basis in fact — which are applied so conclusively that once the presumption has been indulged, the adverse litigant can not rebut the presumption?

Constitutional Provisions.

The following Constitutional provisions are involved:

U.S. Const., 5th Amendment:

> ". . . nor shall private property be taken for public use, without just compensation."

U.S. Const., 14th Amendment:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

U.S. Const., Art. 1, §8, cl. 4 and 18:

"Section 8. Powers Granted to Congress

* * *

"4. To establish . . . uniform laws on the subject of bankruptcies throughout the United States;

* * *

"18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

U.S. Const., Art. 6, cl. 2:

"2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Statement of the Case.

The Subject Property.

This case involves approximately 2 acres of property on California's southern and urban coast. The property is in Los Angeles County, approximately half in the City of Redondo Beach and half in the City of Torrance.[2] Most of the property is on a bluff, overlooking the ocean. The remainder of the property consists of a steep slope leading to the beach below, and a small part of the beach.

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[2]Two separate lawsuits were filed: *County v. Berk* (the Redondo Beach property) (App. F) and *Torrance v. Berk* (the Torrance property) (App. G). The cases were tried and appealed together, resulting in consolidated opinions in the Court of Appeal (App. E) and the California Supreme Court (App. A).

At the time of trial (1972), the property was worth more than $600,000.00.

The Torrance property was developed in the 1920's by the developer of a neighboring residential tract, who built a private club on the property for the residents of his nearby development. The clubhouse occupied almost all the area of the Torrance bluff. After a succession of owners, the clubhouse burned down in 1958.

There was evidence that, during the five year period from 1958 to 1963, some use was made of the property by members of the public for sightseeing and access (down the bluff) to the beach.

In 1963, the Torrance property was acquired by a man named Keillor. He (or a company controlled by him) owned the property for six years, during which time he attempted to develop it for a high-rise apartment. His development efforts received widespread publicity in the area. They were vigorously opposed (and eventually defeated) by neighboring residents, because the neighbors did not want a high-rise blocking their view. No one ever claimed that there were public rights in the property or that it could not be put to conventional, private uses. The widespread publicity surrounding Mr. Keillor's development efforts was sufficient to apprise everyone that this was private property which would eventually be developed.

Stymied in Torrance, Mr. Keillor arranged to trade the beach part of the Torrance property to the County of Los Angeles, in exchange for adjoining land in Redondo Beach. This exchange received widespread publicity, culminating in its approval by the County Board of Supervisors at a public meeting in 1965.

During the delay attendant to trying to develop the Redondo Beach property, Mr. Keillor defaulted on notes se-

cured by deeds of trust, which were liens on the property. To protect his only asset, Mr. Keillor filed a bankruptcy petition in the U.S. District Court. The U.S. District Court appointed a receiver to take possession of the property and issued an injunction to preserve the status quo. It took Mr. Keillor's lender nearly all of 1969 to get the U.S. District Court's permission to foreclose.

The Berks became interested in the property in mid-1970. Mr. Berk examined the County Tax Assessor's records for the property,[3] as well as the planning and zoning files in both Torrance and Redondo Beach. He discussed the property with employees in those offices and learned that Mr. Keillor had problems only because he wanted to erect a high-rise building. Having no such grandiose designs, the Berks were reassured that rational development was possible and purchased the property.

The California Supreme Court Changes the Law.

Before 1970, the law of California was clear, from a series of California Supreme Court decisions beginning in 1915, that an owner of undeveloped beach property who failed to object to "public" use was presumed to have granted a license for such use. This licensed use could not result in the prescriptive loss, or "implied dedication", of the property to the public.

Then in 1970, the California Supreme Court stunned the legal community[4] with its decision in *Gion v. City of Santa Cruz* [consolidated with *Dietz v. King*] (1970) 2 Cal.3d 29. *Gion-Dietz* turned the law around. Under the new *Gion-*

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[3]He learned that the property had always been taxed as valuable private property, available for private development.

[4]Commentators referred to it as a "bombshell", and likened its impact on real property law to both an "earthquake" and a "hurricane." (See text accompanying notes 10-15, *infra*.).

Dietz rule, five years of "public" use no longer resulted in a presumption of a *license but*, instead, of a presumption of an *intent to dedicate* the land to the public.

If *Gion-Dietz* were applied *prospectively* only, property owners would have the opportunity to adjust their actions to the new rule.

But in the case at bench — the California Supreme Court's first substantive consideration of *Gion-Dietz* since it created the rule — the California Supreme Court applied *Gion-Dietz retroactively*. The Court held that innocent pre-1970 acts, which were presumed to have been performed under a *license* from the owner (and thus could not result in the "public's" acquisition of any rights), were *now* to be judged by the post-1970 law, which presumes the owner is giving his property away.

Thus, the California Supreme Court affirmed the trial court's judgments,[5] which found a "recreation easement"[6] in the property "impliedly dedicated" to the public. The trial court found two specific five year periods of use (California's period for adverse possession): 1958-1963 for the

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[5]The California Court of Appeal had partially reversed the judgments, holding that the unreasonable conduct of Torrance and the County in not asserting ownership of these easements before the Berks purchased the property entitled the Berks to compensation for out-of-pocket loss. (App. E). The Supreme Court's grant of a hearing automatically vacated the Court of Appeal's opinion. Justice Clark dissented from the Supreme Court's opinion (App. A, p. 28).

[6]The scope of a recreation easement precludes any use of the property by its owner. "Recreation" includes virtually all human activity, and the public's easement has been declared dominant (App. F and G).

Torrance property,[7] and 1965-1970 for the Redondo Beach property.[8]

The holding with respect to the Redondo Beach property required the inclusion (as one of the five years of "impliedly dedicative" use), of the one year during which the property was in the custody of the Federal bankruptcy court, which had appointed a receiver and enjoined everyone from interfering with the receiver's possession of the property. The California Supreme Court chose to ignore the conflict this created with the Bankruptcy Act and the proper jurisdiction of federal bankruptcy courts. (App. A, pp. 1-27.)

The California Supreme Court's New Rule Was a Startling Change.

Statement of this Case cannot be complete without a brief discussion of the change in California real property law wrought by *Gion-Dietz*.

In the case at bench, the California Supreme Court says *Gion-Dietz* decided nothing new. (App. A, pp. 1-27.)

Virtually no one agrees with the California Supreme Court's hindsight analysis. (Compare Justice Clark's dissent [App. A, p. 28].)

First, as the trial judge acknowledged:

> "I am very concerned. I sympathize with the Berks and with the lenders on the basis that this kind of a

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[7]The five year period was held to begin *on the very day the clubhouse burned down*.

[8]The Redondo Beach property presents a special cause for concern, if not outrage. This is the property which the County had exchanged with Mr. Keillor in 1965. The County gave Mr. Keillor a quitclaim deed in 1965. Then, when — in 1970 — the Berks attempted to *use* the quitclaimed property, the same County filed suit to stop them, on the incredible ground that the property which had been quitclaimed a scant five years before *still belonged to the County*. The "implied dedication" was alleged — and later held — to have begun on the very day the quitclaim was signed. Even one of the County's most ardent supporters felt compelled to refer to this as an example of ". . . the Indian-giving doctrine." (RT 3322) How such action by the government can comport with due process is a mystery.

> holding almost constitutes a legal confiscation. I'm afraid that the lenders and the Berks are really victims of an era where there are *sudden changes in the law*, which doesn't make it any more palatable, I can understand that." (RT 4021; emphasis added.)[9]

The practicing bar agrees.

Assistant California Attorney General Jay Shavelson, one of the successful counsel in *Gion-Dietz*, called *Gion-Dietz* ". . . an earthquake of major proportions . . . in California real property law."[10]

Edward L. Lascher (a former member of the State Bar's Board of Governors, and a past President of the California Academy of Appellate Lawyers) thought it akin to both a "bombshell" and a "hurricane."[11]

While student commentators were somewhat more restrained, they too, echoed this thought:

> ". . . an important extension of the law of implied dedication by adverse use . . ."[12]
>
> ". . . novel use of doctrine . . ."[13]
>
> ". . . excessively expanded an already muddled variation of the doctrine of implied dedication."[14]

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[9]Indeed, because the trial judge thought *Gion-Dietz* could not have been anticipated, he refused to hold Torrance and the County guilty of laches for failing to file suit earlier.

[10]Shavelson, *Gion v. City of Santa Cruz: Where Do We Go From Here?* (1972) 47 Cal.St.B.J. 415.

[11]Lascher, *Tips For the Overburdened Reader* (1971) 46 Cal.St.B.J. 13, 16.

[12]Note, *The Supreme Court of California* 1969 – 1970 (1971) 59 Calif. L. Rev. 30, 231-232.

[13]Note, *This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches* (1971) 44 S. Cal. L. Rev. 1092, 1093.

[14]*Ibid.*

". . . the legal foundation for this decision is equally obscure."[15]

All of these characterizations are true.

Before *Gion-Dietz*, the basic law with respect to implied dedication of coastal property was clearly stated in the California Supreme Court's decision in *F.A. Hihn Co. v. City of Santa Cruz* (1915) 170 Cal. 436. In *Hihn*, the City claimed that property (unused by the fee owner) adjoining public beach property, had been dedicated for public recreational purposes because the public had long used the land as if it were public land, and the owners *never* objected (170 Cal. at 447).[16] The California Supreme Court curtly rebuffed the notion:

> "Where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributable to a license on the part of the owner, rather than to his intent to dedicate. (13 Cyc. 484). This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. (13 Cyc. 484). *It will not be presumed from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically destroy his own right to use any part of the property.*" (170 Cal. at 448) (Emphasis added.)

Hihn was adhered to by the California Supreme Court in the later beach cases of *City of San Diego v. Hall* (1919) 180 Cal. 165, 168; *Whiteman v. City of San Diego* (1920) 184 Cal. 163, 173; and *Manhattan Beach v. Cortelyou* (1938) 10 Cal.2d 653, 668.

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[15]Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication* (1971) 18 U.C.L.A. L. Rev. 795, 802.

[16]The facts are remarkably similar to *Gion* and *Dietz*.

The rational of the *Hihn* line of cases was never judicially questioned until *Gion-Dietz* (see *Shepard's California Citations*).

Now the California Supreme Court says it is otherwise. Its opinion cites earlier decisions which approve implied dedication of property. (App. A, pp. 1-27) There are such. But *all* of the earlier cases dealt either with roads (see Note, *This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches* [1971] 44 S. Cal. L. Rev. 1092, 1099), or well-defined areas, or with *express* (not implied) intent to dedicate. Indeed, the California Supreme Court had *refused* to extend its implied dedication cases to open, undeveloped land (*Hihn, Hall, Whiteman* and *Cortelyou,* all cited above).

Thus, one reading the body of law developed by the California Supreme Court before *Gion-Dietz* would learn that open land was *not* subject to implied dedication. Any public use was presumed to be by license from the owner.[17]

The Federal Questions Are Significant and Were Appropriately Raised Below.

The result of retroactive application of a radical change in property law is that Mrs. Berk's property has been taken from her for public use, without any compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Moreover, the result was achieved in such a fashion as to conflict with Federal bankruptcy law, causing the like-

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[17]Indeed, one group of commentators who were favorably inclined toward the *Gion-Dietz* concept, concluded that the trial court's application of the doctrine in *this* case was wrong. (Gallagher, Jure and Agnew, *Implied Dedication: the Imaginary Waves of Gion-Dietz* [1973] 5 Sw. U.L. Rev. 48, 78.)

lihood of future litigation as others attempt to invoke this decision to evade Federal bankruptcy court orders.

These issues were raised by Mrs. Berk at each level of the California court system, beginning with her pleadings, and maintained throughout.

The decision below seems utterly at odds with the philosophy underlying this Court's June 9, 1980 decision in *Pruneyard Shopping Center v. Robins,* No. 79-289. In *Pruneyard,* this Court found no unconstitutional taking because, "[t]here is nothing to suggest that preventing [the owners] from prohibiting this sort of activity will unreasonably impair the value or use of their property . . ." Here, by contrast, the rights granted the "public" leave the owner with nothing.

REASONS FOR GRANTING THE WRIT.

1.

The Decision in This Case Is of Widespread Importance to Property Owners and Government Agencies.

This case represents a particularly cruel illustration of the grief which can accompany the use of extreme "solutions" to problems perceived as "environmental" in nature.

One can endorse the general public goal of preservation of coastal resources and provision of public access to the shore. Such agreement, however, does not lead to approval of the means chosen by the California Supreme Court to accomplish it.

Confiscation of Mrs. Berk's property, based on events which occurred under [retroactively overruled] legal rules which gave no warning of the confiscation which would later occur, illustrates the California Supreme Court's current preference for the use of confiscation in the name of "environmental preservation".[18]

The general solution devised by the California Supreme Court in *Gion-Dietz* was a radical and unexpected expansion of the doctrine of "implied dedication" based upon a series

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[18]Indeed, the California Supreme Court has recently issued a series of decisions which show a complete disregard for the constitutionally-based protection of private property rights. At least three are presently before this Court as appeals: *Agins v. City of Tiburon*, No. 79-602; *San Diego Gas & Elec. Co. v. City of San Diego*, No. 79-678; and *Briggs v. State of California*, No. 79-1678.

Plainly said, the California Supreme Court has shown an ideological antipathy to private property rights which strips property owners of the protection intended by the U.S. Constitution. A California property owner's rights in the 1980's are treated about as sympathetically as a civil rights worker's in Mississippi in the 1960's. But regional ideology cannot supplant the Constitution as the Supreme law of the land.

The time appears appropriate for a reminder by this Court to the California Supreme Court that confiscation — no matter how well intended — is not constitutionally permitted. (Compare *Owen v. City of Independence* [1980] .... U.S. ...., 63 L.Ed 2d 673.)

of fictional presumptions. The Court presumed that long use of property by "the public" meant that the owner knew of the use being made and acquiesced in it (2 Cal.3d at 38, 84 Cal.Rptr. at 167, 465 P.2d at 55). It further presumed that "public use" for five years meant that the use was adverse (2 Cal.3d at 39, 84 Cal.Rptr. at 168, 465 P.2d at 56).[19] And it further presumed that this presumably adverse use in which the owner presumably acquiesced meant that the owner presumably intended to dedicate his property to "the public" (2 Cal.3d at 38-39, 84 Cal.Rptr. at 167-168, 465 P.2d at 55-56).

The California Supreme Court impliedly presumed that there are no "nice guys" who would allow members of "the public" to use their vacant property, and expressly refused to recognize that a general license to "the public" would or could knowingly be granted (2 Cal.3d at 41, 84 Cal.Rptr. at 169, 465 P.2d at 57).[20]

After five years of such use, the property is deemed dedicated to "the public."

As if this rule were not sufficiently draconian, as formulated in *Gion-Dietz,* the California Supreme Court put the final nail in the coffin of private property rights in the instant case. This case held the revolutionary *Gion-Dietz* decision to have *retroactive* application.

To the "nice guys" in the world, confiscation is their reward. The only California beach owners who escaped *Gion-Dietz/Berk* are the misanthropes who fenced "the public" out.

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[19]It is a bit troublesome to try to reconcile the conclusions that five years of "use by the public" is presumptive proof of *simultaneous* acquiescence and adversity.

[20]The California Supreme Court reached these conclusions without the benefit of any evidence thereon. (Compare *Sotomura v. County of Hawaii* [D. Haw. 1978] 460 F.Supp. 473, 479-480.)

Emboldened by the California Supreme Court's enthusiasm for *ex post facto* confiscation, government agencies in California are seeking to apply the doctrine to its hilt. For example, the following advertisement appeared in the July 3, 1975, Los Angeles Times:

16 Part III—Thurs., July 3, 1975 Los Angeles Times

ATTENTION:

Santa Monica Beach Users

The State of California is suing to confirm the public's rights to use Santa Monica State Beach north of the Santa Monica Pier between California Avenue and Santa Monica Canyon.

If you, your friends, relatives or ancestors have ever used this beach for any recreational activities—**especially that portion near the California Avenue Incline during the 1920's and 1930's—or if you have** any old photographs or written accounts of such recreational use, please contact:

California Attorney General's Office
3580 Wilshire Boulevard Los Angeles, California 90010
Attention: Peter H. F. Graber, Deputy Attorney General

YOUR HELP IS URGENTLY NEEDED

Note the ad's emphasis on attempting to *presently* confiscate property based on actions which occurred *fifty years ago*. Nor is this merely a hypothetical problem. In *City of Long Beach v. Daugherty* (1977) 75 Cal.App.3d 972, 142 Cal.Rptr. 593, the California Court of Appeal affirmed the imposition of an "implied dedication" recreation easement based on activities from 1917 to 1922 (75 Cal.App.3d at 976).

Since then, the California Attorney General has prepared a 112 page *Implied Dedication And Prescriptive Rights Manual,* replete with form questionnaires and newspaper ads (like the one reprinted above), giving government agencies a blueprint for the retroactive invasion of the rights of California property owners, based on turn-of-the-century facts.

The problem is a significant one. It merits this Court's attention.

2.

The California Supreme Court's Decision Conflicts With This Court's Repeated Refusals to Sweep Aside Vested Property Rights by Sudden Changes in the Law.

This Court has consistently held that the 14th Amendment prohibits state courts from establishing or changing rules of law relating to vested property rights in such a way that the rights are taken for public use without just compensation. (*Muhlker v. New York & Harlem R.R.* [1905] 197 U.S. 544, 570-571; *Hughes v. Washington* [1967] 389 U.S. 290, 296-299 [concurring opinion]; *Chicago B.&Q. R. Co. v. Chicago* [1897] 166 U.S. 226, 241.)

In *Hughes,* for example, the Supreme Court of Washington was concerned with preserving its shoreline for public use — like the California Supreme Court here. It did so by

a 1966 reinterpretation of its 1889 Constitution, in a manner the Washington Supreme Court thought was ". . . not startling . . ." (389 U.S. at 297) — like the California Supreme Court here. Mr. Justice Stewart's concurring opinion in *Hughes* illuminates the issue at bench, noting that sudden changes in State law by its Supreme Court cannot be used to evade the Constitutional prohibition against taking private property for public use without just compensation (389 U.S. at 296-299).[21] This is so even if the State Supreme Court neither intends to "take" property, nor realizes that it has radically changed the law.

This Court is no stranger to the question whether an opinion marks a clear break with the past. For example, in *Desist v. United States* (1969) 394 U.S. 244, this Court had to determine whether *Katz v. United States* (1968) 389 U.S. 347, was a sharp departure. Conceding (394 U.S. at 248) that some earlier principles ". . . had been modified . . .", while others " . . . had not survived . . .", and that some pre-*Katz* decisions ". . . may have reflected growing disstisfaction . . .", and even concluding that ". . . our holding in Katz may have been clearly foreshadowed . . .", this Court nonetheless faced the fact that its earlier cases had not been overruled, rendering *Katz* ". . . a clear break with the past . . ."

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[21] And see *Sotomura v. County of Hawaii* (D. Haw. 1975) 402 F.Supp. 95 [ruling on motion to dismiss] and (D. Haw. 1978) 460 F.Supp. 473 [ruling on the merits]; *Robinson v. Ariyoshi* (D. Haw. 1977) 441 F.Supp. 559. *Sotomura* and *Robinson* involved attempts by the Hawaii Supreme Court to redefine beach ownership rights and water ownership rights. In each case, the Hawaii Supreme Court suddenly changed the law, transforming private property into public property. In each case, the U.S. District Court held this could not be done without compensation. (*Sotomura*, 402 F.Supp. at 101, 460 F.Supp. at 481; *Robinson*, 441 F.Supp. at 580, 584-585).

The same is true here. Just as in *Desist, none* of the earlier California cases had been expressly overruled. Indeed, none had even been expressly questioned.

How can it be said that no ". . . clear break with the past . . ." occurred?

What happened in *Gion-Dietz* — as in *Hughes, Sotomura* and *Robinson* — was a drastic re-definition of property rights. That which was private property was declared by the California Supreme Court — under newly issued rules — to have become public.

But those settled, pre-1970 rules formed the basis of property law before 1970. Those who relied on what the courts — including the California Supreme Court — had said *before 1970,* should not be placed in the position of having their property confiscated because they could not predict what the California Supreme Court would do. To do so is to deprive them of their property without *any* legal process —much less due process of law.

3.

The Decision of the California Supreme Court Interferes With the Jurisdiction of Federal Bankruptcy Courts, by Holding That Property in the Custody of a Federal Bankruptcy Court — and Subject to a Federal Restraining Order Preventing Any Change in Ownership — May Be "Impliedly Dedicated" by the Bankrupt to the General Public, While in the Hands of a Federal Receiver.

Please recall that the trial court found the subject property to be "impliedly dedicated" because of five very precisely defined years of public use (App. A, p. 8, fn. 7).

This creates direct conflict with Federal bankruptcy law, because during nearly one year of the "impliedly dedicated" period, the property was *in custodia legis*. The property

owner had commenced bankruptcy proceedings in U.S. District Court, a receiver had taken possession of the bankrupt's assets and a restraining order had issued to protect the estate by prohibiting *anyone* from giving or taking any interest in the bankrupt's estate.

Foreclosure had been imminent when the restraining order was issued. It took the trust deed beneficiary (lender) nearly a year to obtain the Federal court's approval to foreclose.

Thus, for nearly one year out of the five years of "impliedly dedicative" use:

- the property owner was restrained from transferring the property;
- the trust deed beneficiary was restrained from foreclosing; and
- the "public" was restrained from acquiring the property.

Mrs. Berk urged the California courts that one of two results must follow as a consequence of the one year Federal *custodia legis*:

- the Federal court custody *interrupted* the five year period, so that five years of "impliedly dedicative" use had to begin anew when the Federal restraining order was dissolved; or
- the Federal court custody *tolled* the five year period, so that the one year *custodia legis* could not count as one of the years of "implied dedication".

The California Supreme Court rejected these means of harmonizing its "implied dedication" rule with paramount Federal bankruptcy law. Instead, it disregarded the conflict (see App. A, pp. 1-27). To have acknowledged the conflict would not have made the property public.

Long-settled Federal law is to the contrary. It calls for protecting the assets of bankrupt estates from any dilution of the bankrupt's interest.

First. The construction of Federal bankruptcy laws clearly presents a federal question. (*Board of Trade v. Johnson* [1924] 264 U.S. 1, 10; *New Jersey v. Anderson* [1906] 203 U.S. 483, 491.)

Second. Bankruptcy is essentially an *in rem* proceeding (*Hanover Nat. Bank v. Moyses* [1902] 186 U.S. 181, 192; *Local Loan Co. v. Hunt* [1934] 292 U.S. 234, 241), so that the filing of the petition places the assets of the bankrupt *in custodia legis* (*Straton v. New* [1931] 283 U.S. 318, 321; *Meek v. Centre County Banking Co.* [1925] 268 U.S. 426, 429).

Third. The initial consequence of filing the petition is to give ". . . a *caveat* to all the world . . ." that the property is in the hands of the Federal court. (*Muller v. Nugent* [1902] 184 U.S. 1, 14; *May v. Henderson* [1925] 268 U.S. 111, 117.) When accompanied by a receiver and restraining order (as in this case) the ". . . *caveat* to all the world . . ." is even broader:

> "The order of injunction in question was not only in personam but also operated in rem to prevent interference with or the invasion of the property rights of the debtor. It was broad enough in its terms to enjoin all persons from interfering with the property in custodia legis and was sufficient as a public record to impart constructive notice to all."[22]

Fourth. The consequence of providing ". . . constructive notice to all . . ." is that interests in the property may

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[22]*Converse v. Highway Const. Co.* (6th Cir. 1939) 107 F.2d 127, 129-130. To the same effect is *In re Rubin* (E.D. Pa. 1965) 242 F.Supp. 408, 411-412.

neither be given by the property owner nor obtained by others during the Federal court custody. (*Lazarus, Michel, & Lazarus v. Prentice* [1914] 234 U.S. 263, 266; *Cameron v. United States* [1914] 231 U.S. 710, 717.)

The impact of these rules in this case is clear. From the time the bankruptcy petition was filed until the Federal court authorized foreclosure, no dilution of the property owner's interest could occur. The property owner could not give it away (expressly or "impliedly"), the trust deed beneficiary could not foreclose, and no one else could seize it.

The California Supreme Court ignored this. It permitted the property owner's interest to be reduced during the *custodia legis* by refusing to toll the five year period. If that year is removed, five years of "impliedly dedicative" use did not occur. The Berks began construction of new apartments before the end of the tolled period.

Thus, settled Federal bankruptcy law calls for a holding that no easement could be "impliedly dedicated" while the Federal bankruptcy court had possession of the property.

The California Supreme Court's contrary holding interferes with the jurisdiction of Federal bankruptcy courts. It will also generate additional litigation, as creditors and third parties seek to use the California Supreme Court's new rule to evade the impact of Federal bankruptcy restraining orders.

Conclusion.

By retroactively applying a drastic re-definition of property rights, the California Supreme Court has placed numerous property owners in danger of having their property confiscated. Under the California rules, property owners can do little but stand by and watch.

By ignoring the effect of the custody of the U.S. District Court and its bankruptcy receiver, the California Supreme Court has jeopardized the jurisdiction of Federal bankruptcy

courts, as others will seek to take advantage of the disregard for Federal court orders shown by the California Supreme Court.

Mrs. Berk prays that a Writ of Certiorari issue so these significant issues may be addressed, and the Constitutional protection against deprivation of property without due process of law be reaffirmed.

Respectfully submitted,

JERROLD A. FADEM,
MICHAEL M. BERGER,
FADEM, BERGER & NORTON,
A Professional Corporation,
Attorneys for the Petitioner.

APPENDIX A.

The Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California.

County of Los Angeles, Plaintiff, Cross-defendant and Respondent, v. Shirley Berk, Individually and as Executrix, etc., Defendant, Cross-complainant, and Appellant. City of Torrance, Plaintiff and Respondent, v. Shirley Berk, Individually and as Executrix, etc., Defendant and Appellant. L.A. 31099, Super. Ct. Nos. 999043 and SWC 19574.

Filed: Jan. 24, 1980.

In March 1971, the City of Torrance and the County of Los Angeles (County), acting for themselves and as trustees for the public, brought separate actions to establish a "public beach recreation easement" on certain property owned by Oscar and Shirley Berk, naming as defendants in addition to the Berks certain parties alleged to have security interests in the property. Answers and cross-complaints were filed by the Berks and other defendants. In their answers the Berks asserted a number of affirmative defenses, including estoppel and laches. Their cross-complaints, to the extent that they were directed against plaintiffs,[1] sought declaratory relief negating the existence of the claimed easement and also money damages on theories of slander of title, unjust enrichment, and, with respect to County, inverse condemnation. The actions were consolidated for trial, and after a trial by the court judgments were entered in favor of plaintiffs in all respects. All defendants including the Berks ap-

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[1]Affirmative relief was also sought against other parties on other grounds. These claims were severed from the main action, to be tried separately, and do not concern us here.

pealed,[2] but all appeals other than that of the Berks were dismissed by the Court of Appeal prior to our granting a hearing. Thus, only the Berk appeal is presently before us.[3]

I.

The property here in dispute consists of slightly less than two contiguous acres of vacant shoreline land straddling the boundary line between the Cities of Torrance and Redondo Beach. It includes sandy beach areas (none of which presently extend to the mean high tide line) together with steep slopes and a considerable bluff area overlooking the ocean.[4] Seaward from the property, and surrounding the sandy beach portions thereof, is an expanse of what is now public beach. There are no visible artificial boundaries between the subject property and the public beach.

In the 1920's this property, together with an additional parcel lying seaward from the Torrance portion thereof, was

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[2]Oscar Berk died during the pendency of the appeal. The sole appellant remaining is Shirley Berk, both in her own behalf and as executrix of the estate of her late husband. We hereafter refer to her as "defendant."

[3]County has filed a motion to dismiss the Berk appeal as well, urging present mootness. It is pointed out that after judgment was rendered certain holders of security interests in the subject property, upon default by the Berks, foreclosed those interests and acquired the Berks' fee interest, which has now been sold to County for an undisclosed amount. Thus, it urged, appellant Berk lacks any present substantial interest to be adjudicated. It is clear, however, that in spite of these events Berk presently retains such an interest in obtaining monetary redress on equitable grounds under the allegations of her cross-complaint. (See and cf. Klopping v. City of Whittier (1972) 8 Cal.3d 39, 58.) Because a determination of her right to such relief must necessarily involve an examination of the judgments in their entirety, we decline to dismiss her appeal. (Cf. American Enterprise, Inc. v. Van Winkle (1952) 39 Cal.2d 210, 217-218, and cases there cited.)

[4]Prior to the completion of a beach-widening project in 1967 and 1968 (see fn. 5, *post*) the seaward border of the property was apparently the mean high tide line, and in winter the sea often reached the base of the cliff or sloping area. Presently the seaward border of the property is not touched by the sea.

acquired by the developer of a neighboring residential area, the Hollywood Riviera tract. In 1928, the developer constructed a large private beach club on the bluff portion of the property for the use of owners of homes in the tract. Following the depression shares in the property were distributed among the Hollywood Riviera homeowners, who in 1947 sold a seaward portion of the property lying in Redondo Beach to County. In 1958, however, the beach club building burned to the ground, and the only evidence of it presently remaining consists of steps leading from the bluff to the beach below.

In 1963, the remaining property was sold to a real estate developer named Keillor, who planned to construct a high-rise condominium thereon. He placed a small real estate office on a bluff portion of the property lying in Torrance and commenced a public promotion program designed to persuade local homeowners of the merits of his project. In this, however, he was unsuccessful. Meeting with strong and effective opposition from members of the Hollywood Riviera Homeowners' Association, who wished to maintain the low-density character of the neighborhood, he abandoned the project in Torrance after being denied a variance by the city council in 1964. Thereupon Keillor turned his attention to the development of the bluff portions of the property which lay in Redondo Beach. Pursuant to these plans, in 1965 he negotiated an exchange of parcels with the County, trading a seaward parcel lying in Torrance for the seaward parcel in Redondo Beach which had previously been sold to the County by the former owners of the property.[5] Again, however, his plans miscarried when he failed

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[5]Keillor subsequently granted the County a right of entry over the parcel he obtained in this exchange in order to enable it to replenish and maintain the surrounding public beaches. In 1967 and 1968, he also permitted a private concern to store certain materials on the bluff portion lying in Torrance while it performed a beach-widening project pursuant to a contract between the County and the United States Army Corps of Engineers.

to obtain financing for the planned Redondo Beach development, and following subsequent difficulties in meeting his financial obligations under secured notes relating to the property, he filed a petition for bankruptcy. In November 1969, after the property had been held in receivership for approximately one year, foreclosure was effected by one of the trust deed holders, Halperin, who then became the owner.

In 1970, Halperin, seeking to dispose of the property, opened an escrow on the remaining Torrance portion (i.e., the bluff area upon which the bulk of the private beach club had stood) with a group of developers. After it appeared, however, that the group's plans, which contemplated the erection of a high-rise building, would require a density variance, local homeowners again mobilized their efforts, and when in July 1970 the request for variance was denied the escrow was terminated.

In the meantime, defendant Oscar Berk had become aware of the availability of the Redondo Beach portions of the property. After a personal inspection of the property he proceeded to consult county tax records and familiarize himself with applicable zoning and building requirements. In the course of these investigations he was advised of the likelihood of local homeowner opposition to any planned development but was given to understand that any such opposition would probably not affect his plans with respect to Redondo Beach. Upon learning of the termination of the escrow on the Torrance portion of the property, however, he expanded his investigations to include it as well. These soon revealed that homeowner opposition in Torrance was a more significant factor, the Hollywood Riviera Homeowners' Association being composed of Torrance residents. In view of the experience of the previous group of prospective developers he was advised that development would

be possible in Torrance only if he could create a plan which would require no variances. Concluding that this was possible, he proceeded to draw plans for a four-story apartment complex utilizing the bluff parcels in both Redondo Beach and Torrance. These plans were presented to officials in both cities. Upon being advised by these officials that his plan would require no variances from applicable zoning and building codes, he submitted an offer on the whole of the property and an escrow was opened.

During the pendency of the escrow Mr. Berk continued his discussions with city officials in both Redondo Beach and Torrance; these discussions were concerned with how, rather than whether, the project should proceed. On September 28, 1970, the escrow closed, and shortly thereafter Berk obtained a building permit from Redondo Beach. In February 1971, construction commenced on the Redondo Beach portion of the property and Berk applied for a building permit in Torrance. At this point, however, members of the local homeowners' body—who the previous autumn had become aware of the then-recent decision of this court in Gion v. City of Santa Cruz (consolidated with Dietz v. King) (1970) 2 Cal.3d 29[6] —appeared before the Torrance City Council urging that an action be filed by the city to quiet title to public recreational easements on the Torrance portion of the property. On March 13, 1971, the Torrance action was commenced and shortly thereafter the County, after receiving a similar request, filed its own action with respect to the Redondo Beach portion of the property. An

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[6]Hereafter, in referring to our decision in the consolidated cases of *Gion v. City of Santa Cruz* and *Dietz v. King*, we shall adopt the hyphenated usage which has become customary among commentators, bench, and bar: *Gion-Dietz*.

injunction was obtained preventing further construction during the pendency of the litigation.

II.

Our decision in *Gion-Dietz* was filed on February 19, 1970, more than six months prior to the opening of the Berk escrow. In that case this court, after examining a number of well-established principles governing the implied common law dedication of public easements in private real property, held that such principles were applicable in the case of shoreline property and that, given certain conditions of public user and owner inaction, a public easement for recreational purposes could arise in such property. The decision received substantial coverage and commentary in the public media and was the subject of considerable attention in legal publications.

The City Attorney of Torrance, although he became aware of the *Gion-Dietz* decision soon after it appeared in the advance sheets, was initially uncertain whether its application was limited to sandy beach areas or extended as well to slope and bluff areas of beach property. He did not then communicate with the planning and building departments concerning the decision and its possible implications. By the time that the Berk escrow closed (Sept. 1971), however, he had apparently resolved his uncertainties, for by that time he had filed on behalf of the city several actions seeking to establish public recreational easements in shoreline property—including five such actions concerning bluff property. He had not, however, undertaken such action concerning the portion of the property here in question which lay in Torrance, apparently because the deputy who prepared the letter seeking authorization for suit was under the impression that the parcel in question was county property.

Mr. Berk did not learn of the *Gion-Dietz* decision until late October or early November 1970, when he was informed of it by his engineer. By this time, of course, the escrow had closed. None of the officials in Redondo Beach or Torrance with whom he had dealt prior to and during the escrow had advised him of the decision or of the effect which it might have on the subject property.

III.

There was ample evidence presented at trial concerning public recreational use of the property here in question. That evidence, viewed in a light most favorable to the prevailing parties, established in general that the whole of the subject property (excepting, for the 30-year period between 1928 and 1958, the site on which the beach club building stood) has been subject to public recreational use of substantial diversity and scope for several decades. The present sandy beach portion of the property (contained within the parcel which was in County ownership from 1947 to 1965) has been used along with the adjoining beach area by thousands of persons annually—persons engaged in all of the recreational pursuits generally associated with the seashore. The area sloping up toward the bluff—most notably that containing the stairs from the old beach club—has been used for access to the beach below. The bluff area, lying largely in Torrance, has been used by the public for a great variety of purposes, including enjoyment of the spectacular marine view, photography, painting, dog-walking, picnicking, bicycling, and the parking of vehicles. Occasional efforts on the part of former owners, including the posting of signs and the erection of chain barriers, has had little effect upon what one witness referred to at trial as "the multitudes," and after the 1958 clubhouse fire no fencing of any kind was attempted.

There was also evidence that for 25 years preceding 1970, the County maintained the property as if it were publicly owned, cleaning it regularly of the debris generated by public use and providing lifeguard services on the beach area.

On the basis of the foregoing evidence the trial court concluded in substance that the whole of the property in question was subject to an easement arising out of implied dedication for public recreational purposes.[7] It also concluded that neither plaintiff was guilty of laches or should be estopped from asserting the claim of public right. With respect to defendants' cross-complaints the court concluded that no provision of the state or federal Constitutions had been violated by plaintiffs, that no act amounting to slander of title had occurred, and that inverse condemnation had not resulted from plaintiffs' actions. Judgments were entered declaring the existence of the said public easement; quieting title thereto in plaintiffs for themselves and as trustees for the people; enjoining defendants from all construction or other conduct which would interfere with or obstruct the full use and enjoyment of the public easement; and ordering that defendants take nothing by their cross-complaints.

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[7]The court in its findings undertook to assign various time periods during which the easement had been perfected with respect to the several constituent parcels. It was found and concluded that implied dedication had occurred with respect to those portions of the property which had been the site of the beach club house (i.e., the entire Torrance portion and that part of the bluff area lying in Redondo Beach) "during the period commencing on a date subsequent to September 25, 1958, [the date of the club house fire], but prior to November 1, 1958, and ending on or by November 1, 1963." The sandy beach and slope portion lying in Redondo Beach, on the other hand, was found to have been dedicated "during the period September 7, 1965 [the date it was received by Keillor in exchange for the similar parcel to the south of it] to September 28, 1970 [the date of the closing of the Berk escrow]."

IV.

Defendant Shirley Berk, the sole appellant herein (see fn. 2, *ante*), raises several arguments challenging the trial court's application of *Gion-Dietz* to the instant case. It is urged in essence (1) that *Gion-Dietz* may not constitutionally be applied to a case such as that at bench in which the facts giving rise to the asserted public easement antedated the *Gion-Dietz* decision; (2) that even if it can be so applied, *Gion-Dietz* should not be read to permit the establishment of a public easement on the basis of "mere public use" for the requisite period but should instead be interpreted to require a specific finding of adversity or claim of public right; (3) that settled rules of property governing the acquisition of prescriptive interests preclude the application of *Gion-Dietz* in the instant circumstances; and (4) that considerations of fundamental fairness, among them those shaping the doctrines of laches and estoppel, will not allow the result reached below. Sensible of the significance of these contentions—and of the interest of the bench and bar of this state in obtaining guidance relative to the matter of the implied dedication of public recreational easements—we take up each of them in order.

A. "Retroactive" Application.

Defendant Berk, characterizing the *Gion-Dietz* decision as "revolutionary," urges that to apply its precepts to a case such as that at bench, wherein the events giving rise to the alleged dedication occurred prior to our decision, results in an unconstitutional taking of property. She recognizes, of course, that the *Gion* and *Dietz* cases themselves were based on events similarly situated in time, but she urges that the principle of Stovall v. Denno (1967) 388 U.S. 293, 301—pursuant to which a new rule of law, although applied to the parties before the court in the case establishing

it, may be limited to otherwise prospective application—should here have application to preclude an unconstitutional result. In view of significant reliance by former owners of the property here in question upon rules of public dedication in existence prior to the *Gion-Dietz* decision, it is argued, it is those rules, and not the precepts of *Gion-Dietz*, which must here apply.

We think it clear that defendant may properly raise this contention. Although the *Gion-Dietz* decision became final several months *prior* to the opening of the subject escrow, this fact cannot preclude Mrs. Berk from challenging a dedication to the public which occurred, if at all, at a time substantially previous to that decision. Even if it must be presumed—contrary to the record herein—that Mr. and Mrs. Berk acted with full knowledge of *Gion-Dietz*, and even if it be granted that they were on notice of substantial past and present use of the subject property by the public, these factors are in no way inconsistent with defendant's present position. If the principle of *Gion-Dietz* may not be constitutionally applied to allegedly dedicatory events and circumstances occurring previous to our decision, defendant's knowledge—presumed or otherwise—becomes a matter of little consequence, for the property passed to her free of any public easement.

Passing on to the merits of the contention, however, we find ourselves unable to accept its major premise—i.e., that the *Gion-Dietz* decision marked so "revolutionary" a change in the law that to apply its precepts to past events and actions, occurring in the context of prior law, is to countenance an unconstitutional taking of property without due process of law. We conclude on the contrary that *Gion-Dietz*, far from signaling the momentous "redefinition of

property rights'' which defendant would depict,[8] simply represents a restatement and clarification of well-established former law and an application of that law, as so restated and clarified, to a unique pattern of factual circumstances. Such a decision, we think, cannot be deemed to so betray the legitimate and reasonable reliance interests of property owners that its application to them and their property amounts to an unconstitutional taking of vested rights.

As early as 1854 this court, in addressing the matter of common law dedication of property to the public, indicated that such a dedication might occur not only be deed or other action so manifesting dedicatory intention on the part of the owner but by ''lapse of time.'' (San Francisco v. Scott (1854) 4 Cal. 114, 116.) In a series of subsequent cases it was made clear that dedication arising out of ''lapse of time,'' in the words of *Scott*, was to be distinguished from dedication arising from dedicatory acts or conduct by the owner in that it looked not to the intentions of the owner but to the intent and activities of the public on the land in question; here the inquiry became whether the public,

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[8]Defendant's characterization of the *Gion-Dietz* decision appears to have been shared in substance by the authors of several of the comments appearing in legal literature shortly after its rendition. (See, e.g., Note, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches* (1971) 44 So.Cal.L.Rev. 1092; Note, *The Common Law Doctrine of Implied Dedication and its Effect on the California Coastline Property Owner* (1971) 4 Loyola L.A.L. Rev. 438; Lascher, *Highlighting the California Law Reviews* (1971) 46 State Bar J. 13, 16-17; Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz* (1971) 8 Cal.Western L.Rev. 75; Armstrong, *Gion v. City of Santa Cruz: Now You Own It—Now you Don't* (1970) 45 L.A. Bar. Bull. 529; but see Comment, *Public Access to Beaches* (1970) 22 Stan.L.Rev. 564.) More recent commentary, however, has adopted a somewhat different view, tending to view *Gion-Dietz* as a predictable development and elaboration of established law. (See Briscoe & Stevens, *Gion After Seven Years: Revolution or Evolution?* (1977) 53 L.A. Bar J. 207; Gallagher, et al., *Implied Dedication: The Imaginary Waves of Gion-Dietz* (1973) 5 Sw.U.L.Rev. 48.).

through long-continued "adverse" use of the property, had so manifested its public aspect as to justify the implication in law that a dedication had occurred. (See especially Schwerdtle v. County of Placer (1895) 108 Cal. 589, 592-596; see also Hartley v. Vermillion (1903) 141 Cal. 339, 348-349; People v. Myring (1909) 144 Cal. 351, 354; Hare v. Craig (1929) 206 Cal. 753, 757; Diamond Match Co. v. Savercool (1933) 218 Cal. 665, 669-670.) Our 1954 opinion in Union Transp. Co. v. Sacramento County (1954) 42 Cal.2d 235, which drew upon all of these as well as other cases, identified this form of dedication as one implied in law, as opposed to those forms resting upon the acts of acquiescence of the owner, which it characterized as implied in fact. (*Id.*, at p. 241.)

Our *Gion-Dietz* case, adverting to this venerable line of authority, went on to distinguish the character of "adversity" necessary to implied in law dedication to the public from that obtaining in the law of private prescriptive rights, pointing out that what must be shown here is not a personal claim of right but rather a use by members of the public "believing the public had a right to such use." (2 Cal.3d 29, 39.) Here again we did not purport to announce "new law" but rather to consolidate and explain prior expressions and holdings. Indeed, as long ago as 1908 it had been explained that in such cases the public was not required "to make proclamation that they are using [the subject property] under a claim of right where the right is asserted as flowing from long usage with the knowledge and acquiescence[9] of the owner of the land; nor is it always necessary

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[9]In the case of Hare v. Craig, *supra*, 206 Cal. 753, at page 755, we had indicated that the owner's "knowledge and acquiescence" did not imply permission or license in this context but rather suggested the absence of any significant acts by the owner "which would interrupt the continuity of the adverse use . . . ."

to show some aggressively hostile act by the public that such use was intended to be adverse to the owner. The claim of right, the adverse character of the use and the knowledge and acquiescence[10] of the owner of the land may be presumed from the facts and circumstances attending the use." (Barnes v. Daveck (1908) 7 Cal.App. 487, 490-491; see also Laguna Beach v. Consolidated Mtg. Co. (1945) 68 Cal.App.2d 38, 43-44.).

It is suggested, however, that the form of dedication to the public here in question had, prior to *Gion-Dietz*, always been limited in application to cases involving roadways, and that the possible application of these principles to other types of property could not reasonably have been anticipated. In responding to this argument, however, we need look no further than the case of Morse v. Miller (1954) 128 Cal.App.2d 237, wherein the court, relying significantly upon the very portion of the *Union Transportation* opinion which we summarized in *Gion-Dietz*, concluded that the trial court's finding of public dedication of beach front and athletic field property could be supported on the theory, among others, of implied in law dedication arising from long-continued adverse public use. The *Morse* decision, cited in *Gion-Dietz* (2 Cal.3d at p. 43), antedated it by almost 16 years.

Defendants make much of the case of F.A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436, urging in essence that it and later cases following it had the effect of lulling beachfront landowners into a false sense of security by assuring them that failure to object to public use of their lands would not lead to a presumed intention on their part to create public rights therein. As we pointed out in *Gion-Dietz*,

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[10]See footnote 9, *ante*.

however, the case of O'Banion v. Borba (1948) 32 Cal.2d 145 made clear that future cases were to be decided not from the standpoint of presumptions but from that of "the sufficiency of the evidence in the light of all the circumstances disclosed." (32 Cal.2d at p. 150.) More significantly, perhaps, the landowner relying on *Hihn* and related cases, whatever comfort he may have derived from them with respect to implied in fact dedication arising from his own act, could not reasonably have read them to suggest that they precluded the emergence of public rights in his property due to long-continued public use—i.e., through a dedication implied in law. Not only was the subject language clearly dictum in the *Hihn* case itself (see 170 Cal. at p. 447), but the issue there addressed was that of dedication by the owner through acts manifesting a dedicative intent—i.e., implied in fact dedication.[11]

We conclude on the basis of the foregoing that our *Gion-Dietz* decision had none of the "revolutionary" aspects which defendant would ascribe to it. Not only were the principles upon which it relied firmly imbedded in prior decisional law, but they had previously been applied on at least one occasion to property of the general character here involved. It thus cannot be maintained that the application of these principles on the basis of facts taking place previous to *Gion-Dietz* resulted in an unconstitutional taking of property.

We reject for similar reasons defendant's related contention that a "mutual mistake of law" vitiated any donative

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[11]This was made quite clear in the subsequent case of Manhattan Beach v. Cortelyou (1938) 10 Cal.2d 653, where we cited *Hihn* as a clear illustration of the principle that "Acts of a landowner from which the law implies a dedication of his property for public use as a street do not always lead to the same result where land is used for other purposes." (*Id.*, at p. 667.).

intent on the part of prior owners. As we have pointed out, the principles of implied in law dedication to public use look not to the intent of the owner but to the intent and activities of the public.

B. Public Intent.

It is urged that the judgments cannot stand because they are unsupported by a specific finding that the public's use of the subject property was accompanied by a belief on its part that it had a right to such use. The trial court specifically found, however, that the uses made of the subject property by the public were made "as if said parcels were part of a public recreational area." This, under the specific terms of our *Gion-Dietz* decision, was a sufficient finding of that kind of "adversity" which is requisite to implied in law dedication. (2 Cal.3d at p. 39.)

Defendant also argues that the evidence before the court cannot be read to support such a finding of public interest. Without detailing the evidence upon which she relies, we can adequately characterize it as indicating that during the periods of time in which public dedication was held to have occurred no reasonable member of the public could have concluded that the subject property was publicly owned. Even if we ignore all contrary evidence, however — the fact remains that knowledge of private *ownership* is not inconsistent with a belief in a right to public *use*. No case has ever suggested that the public, in order to bring about the implication of public rights upon private land, must act in the belief that the land is in public ownership. It is enough that the public demonstrate through its actions that its members believed that they had a right to use the property as they did.

We do not here suggest — nor have we ever in the past suggested — that the requisite belief on the part of the

public, as manifested by its actions with respect to the property, is not subject to the requirement of reasonableness in all of the circumstances. Thus if the owner can show that his efforts to exclude the public or otherwise discourage public use were such that the public was effectively put on notice that its use of the property was not authorized, he may thereby preclude the accrual of public rights. This question, however, is ordinarily one of fact, to be determined in light of all of the circumstances. (See *Gion-Dietz, supra,* at p. 41.) In the instant case the trial court found on the basis of substantial evidence "that no effective effort was made by any owner or anyone else to interfere with or halt such use by said members of the general public at any time."

C. Third Party Interests; the Effect of Receivership.

Defendant advances several technical arguments based upon the presence of secured interests in the subject property and the placing of a portion thereof in receivership. It is urged (1) that no rights of a "prescriptive" character could accrue to the public in the presence of deeds of trust affecting the subject property; (2) that even if such rights could accrue in these circumstances, they were here cut off prior to perfection by the occurrence of foreclosure sales; and (3) that the placing of a portion of the subject property in receivership during the "prescriptive" period cut off all inchoate public rights or at least had a fatal tolling effect with respect to their perfection.

We think it important before addressing each of these contentions separately to draw attention to a fundamental misconception which runs through all of them. We deal here not with a form of prescription or adverse possession but with a unique form of *dedication*. Here the element of "adversity" is looked to not as a factor necessary to the

perfection of a superior property right in the possessor or possessors as such (i.e., in themselves) but rather as an ingredient in the evidentiary structure necessary to the implication in law that a dedication to the public as a whole has occurred. (See 3 Miller & Starr, Current Law of Cal. Real Estate (rev. ed. 1977) § 20:13, p. 475.) When that structure is made to appear the public is not deemed to have wrested its right from the owner but rather is held in law to have been granted it by him. Thus, the true questions facing us are (1) whether such a dedication may be made through legal implication in the face of deeds of trust affecting the subject property; (2) whether foreclosure and sale under such deeds of trust prior to the time when dedication would otherwise be implied operates to prevent such dedication on the part of the new record owner; and (3) whether the placing of the property in receivership operates to remove the period of such receivership from consideration with respect to the implication of dedication on the part of present or future record owners.

While we are aware of no case which discusses the effect of the presence of deeds of trust affecting the subject property on its implied in law dedication to public use, there are two cases which bear indirectly on the problem. In People v. Myring, *supra,* 144 Cal. 351, this court held that long-continued public uses of a roadway and bridge situated on land held by defendant pursuant to a federal patent had resulted in their implied in law dedication to public use. When it was objected that such a dedication could not be so implied because the property was held under a declaration of homestead giving rights therein to defendant's wife, we responded as follows: "If the prosecution had sought to show a declaration by deed from him alone, this objection might have been good . . ., but the dedication which is presumed from the adverse user by the public operated as

an estoppel against the wife as well as the husband, and was independent of any question of homestead.'' (*Id.*, at p. 355.)

A parallel result was reached in the case of Gray v. Magee (1933) 133 Cal.App. 653. There a certain roadway long dedicated to public use had been rerouted shortly before the death of the owner of the property over which it is passed. The question was whether the relocated portions of the roadway were subject to implied in law dedication through continued public user of them during the pendency of the owner's estate, it being urged in essence that the executors of the estate had no power to make any kind of dedication contrary to the interests of the beneficiaries. We disagreed with this contention. ''Without doubt,'' the court said, ''an executor may not make an express dedication as to estate lands, but an easement may arise as to estate lands through implied dedication or prescription.'' (*Id.*, at p. 662.)[12]

What these cases would seem to indicate is that a dedication implied in law as a result of adverse public user arises ''independently'' of third party interests in the property. This is so, we believe, because of the character of the public user which underlies any such dedication. Such user must be substantial; it must be carried on by diverse members of the public; and it must be ''adverse'' in the sense that we have explained. Such user must be held to impart notice of

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[12]The court cited by way of analogy the early case of Patchett v. Pacific Coast Ry. Co. (1893) 100 Cal. 505, a case involving an easement by prescription over trust lands. There this court, addressing the effect of the trustee's failure to bring an action within the statutory period upon infant beneficiaries, quoted with approval from earlier authority as follows: '' 'The rule that the statute of limitations does not bar a trust estate holds only between *cestui que trust* and trustee, not as between *cestui que trust*, and *trustee* on one side, and *strangers* on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. . . .' '' (100 Cal. at p. 510; original italics.) (See also Triplett v. Williams (1969) 269 Cal.App.2d 135, 137-138; Rest. 2d Trusts, § 327, p. 125.)

its occurrence to the whole world, including the holders of other interests in the property.

It is objected that the holder of a deed of trust on property subject to public user of the nature here in question, even if he is deemed to be on notice of it, is wholly without power to discourage or prevent it. This, however, does not appear to be so. Under the provisions of section 2929 of the Civil Code, one whose interest in property is subject to a deed of trust is precluded from doing any act which will substantially impair the security of the beneficiary of the deed of trust. (See Cornelison v. Kornbluth (1975) 15 Cal.3d 590, 599.) Such acts, we believe, must be held to include that of permitting public user of the character here in question, and we see no reason why such a beneficiary may not maintain an action to prevent its continuance. (See Code Civ. Proc., § 526, subd. 2; Lavenson v. Standard Soap Co. (1889) 80 Cal. 245; Perrine v. Marsden (1867) 34 Cal. 14; Buckout v. Swift (1865) 27 Cal. 433; Robinson v. Russell (1864) 24 Cal. 467.).

The case of Phillips v. Laguna Beach Co. (1922) 190 Cal. 180, upon which defendant strongly relies, is of little assistance to her. There the owner of beachfront property had, by resolution of its board of directors, offered to dedicate a portion of it along the shoreline to public use for park purposes. Subsequent public use was apparently not intense and occurred on a less than regular basis, but it was held that such use was sufficient to constitute an acceptance by the public of the offered dedication. We also held, however, that the judgment—which enjoined future sale or encumbrance—could not be sustained as to the beneficiary of a trust deed who had made a loan on the property some 10 years after the offer of dedication was made. Nothing of record had alerted the beneficiary of the prior dedication and, we noted, a view of the premises at the time of the

loan had revealed no significant evidence of public use. "There is no evidence that the public were occupying the public use at the time of the visit of the [beneficiary], *nor that it ever had occupied any part of the premises so as to impart notice to the* [*beneficiary*] . . . ." (190 Cal. at p. 185; italics added.) Thus it is clear that even had this case involved implied in law dedication (which it did not, being concerned with express dedication), and even if it had addressed the question of the effectiveness of such dedication in the presence of existing deeds of trust (which it did not, any dedication therein having occurred long prior to the inception of the deed of trust), it suggests only that sparse public user of the type therein involved was not such as to impart notice of its occurrence. We deal here with an entirely different situation, involving substantial, diverse, and readily apparent public user over a considerable period of time.

We conclude on the basis of the foregoing that public user of the character involved in the instant case must be held to impart knowledge of its occurrence to the world at large, and that when it has continued for the requisite period of time a dedication to the public will be implied in law which binds not only record owners but all persons having interests in the subject property—including the beneficiaries of deeds of trust in existence during the said period.

We are further of the view that the occurrence of foreclosure and sale during the course of the dedicatory period should lead to no different result. Although the purchaser at such a sale will normally receive title free and clear of any unrecorded interests or liens (see 1 Miller & Starr, Current Law of Cal. Real Estate (rev. ed. 1975) § 3:121, p. 544), and although no rights of a prescriptive or adverse nature can arise against him prior to sale and the expiration of the period of redemption (see 3 Miller & Starr, Current

Law of Cal. Real Estate, *supra*, § 19:25, pp. 431-432), we believe that the unique form of notice imparted by public user of the character here in question should operate to burden the title received by the purchaser with all accumulated public interests, even if they not be ripened into an implied dedication at the time he receives title. Accordingly, dedication may in some circumstances be implied in law on the part of such a purchaser even when he has not been record owner for the full length of the dedicatory period.

The fact that the subject property was in federal receivership during a portion of the period of public user did not in our view operate to cut off accumulated public interests or remove the period of receivership from consideration for purposes of implied dedication to public use. The order appointing receiver, in enjoining all persons "from interfering with the Receiver's possession of the assets . . . and from attempting in any manner to take possession" of said assets without court order, was intended "to preserve the estate or prevent loss thereto" (11 U.S.C.A. § 11(a)(3)) pending disposition pursuant to the chapter XI proceedings which led to its issuance. (See generally, 2 Cowans, Bankruptcy Law and Practice (2d ed. 1978) § 606, pp. 263-266; 1 Clark, The Law and Practice of Receivers (3d ed. 1959) § 74, pp. 100-101.) It did not purport to enjoin the public from continuing its long-established uses of the property—at least insofar as such uses did not result in "loss" to the estate during the period of receivership. We therefore see no reason why continued public user occurring during the subject period should be disregarded or omitted from consideration with respect to a dedication implied in law after the termination of the receivership.

D. Estoppel and Laches.

Defendant contends that plaintiffs should be estopped from claiming the public recreational easement here found to exist by the trial court. It is urged that the County, by assessing and taxing the property as if it were private and not subject to such an easement, and the officials of the Cities of Redondo Beach and Torrance by applying their zoning and building ordinances to the property on the same assumption, thereby represented to defendant and her husband that the said assumption was true. The Berks, it is argued, relied on this representation to their detriment.

We see no merit in this argument. The trial court found, on the basis of substantial evidence, that plaintiffs lacked any actual knowledge that a public easement existed on the subject property, that they at no time acted with an intent to deceive the Berks or any of their predecessors in this respect, and that they were guilty of no culpable negligence in treating the property as they did. Moreover, any reliance by the Berks on the actions of the governmental entities here involved was clearly unreasonable. It simply cannot be maintained that an existing or prospective property owner, upon being advised by planning and building officials that a given project complies with applicable local codes, thereby gains the right to proceed with that project regardless of the rights of third parties or the public in the prooperty on which it is proposed to be built. Finally, any such reliance must also be deemed unreasonable in light of the Berks' knowledge of the long-continued public user of the property—the *Gion-Dietz* decision having been rendered by this court five months prior to the opening of escrow.

It is suggested that there is some inherent inconsistency in a determination that whereas governmental officials were not culpably negligent in treating the property as if it were

not burdened with a public easement, the Berks and others in the chain of title acted other than reasonably in relying on such treatment in their own assessment of the status of the property. The short answer to this, of course, is that the owner of property or one proposing to acquire it cannot justify his ignorance of the true state of the facts and the law affecting it by pointing to similar ignorance in government bodies. Negligence which may be less than culpable in a government body, charged with the administration and regulation of vast amounts of land under diverse ownership, cannot be so easily excused in one whose interest is focused upon a particular piece of property.

Even if the elements of estoppel[13] here appeared—which as we have indicated they do not—this is not a case in which an estoppel could properly be raised against the government and the people to defeat a claim of public recreational easement. It is well established that an estoppel will not be raised against such parties when to do so would nullify "a strong rule of policy, adopted for the benefit of the public, . . ."; (County of San Diego v. Cal. Water etc. Co. (1947) 30 Cal.2d 817, 829-830; cf. City of Long Beach v. Mansell, *supra*, 3 Cal.3d 462, 493-501.) As we pointed out

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[13]As we pointed out in City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 490, quoting from an early case: " '[T]o the application of this principle with respect to the title of property, it must appear, *first*, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; *second*, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; *third*, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.' " (Original italics.) We went on to point out in *Mansell* that the third of these requirements has been interpreted to mean that a person seeking to raise an estoppel in this context be destitute not "of all possible means of acquiring knowledge of the true state of the title, but rather of all convenient or ready means to that end." (*Id.*, at pp. 490-491.)

in *Gion-Dietz,* there is a clearly enunciated public policy in this state in favor of allowing public access to shoreline areas. (2 Cal.3d at pp. 42-43.) To allow the raising of an estoppel to defeat the claim of public right here involved would be manifestly contrary to this policy.

Considerations identical to the foregoing support the trial court's refusal to permit the assertion of the equitable defense of laches. (See People v. Department of Housing & Community Dev. (1975) 45 Cal.App.3d 185, 196, and cases there cited.)

V.

Defendant additionally asserts that the trial court erred in denying recovery in damages under the cross-complaints directed against the governmental plaintiffs. It is urged that the failure of these entities to act more promptly in light of *Gion-Dietz* with respect to the property here in question—whether by advising interested parties of its possible status under that decision or by expeditiously filing an action to establish the public claim of easement—resulted in their purchase of the property and subsequent losses. These losses, she asserts, should be recoverable against the entities who, by bringing these actions subsequent to the purchase, brought them about.

The sole authority advanced in support of this novel proposition—and that only by way of analogy—is the case of Klopping v. City of Whittier, *supra,* 8 Cal.3d 39. We there held that a property owner who can demonstrate that his land has suffered a diminution in value "as a result of" unreasonable precondemnation actions on the part of a public authority—such activities there alleged to involve unreasonable delay of an eminent domain action following the prior announcement of intent to condemn—is entitled to recover his consequent losses from the public authority.

(See especially *id.*, at pp. 51-52.) It is suggested that here, by the same token, the governmental plaintiffs were guilty of "unreasonable conduct" in treating the subject property without respect to any possible claim of public easement and dealing with its prospective owners on the sole basis of their right to develop it under applicable zoning and building ordinances, only to reverse this position after the purchase had occurred by maintaining the instant actions to establish a public easement. This conduct, defendant asserts, resulted in the losses suffered by them due to the subsequent establishment of the easement.

The suggested analogy, we think, is manifestly overbroad. Even if it be assumed for purposes of argument that the actions of the governmental agencies here involved were "unreasonable" in some sense—a fact which the instant record can by no means be said to establish as a matter of law (see part II, *ante*)—we cannot conclude that the losses accruing to defendant from the purchase of the subject property occurred "as a result of" such governmental actions within the meaning of *Klopping*. In the latter case the property owner, faced with the condemner's intention to proceed and its failure to institute proceedings, was wholly without means for averting the diminution in value which ensued.[14] Here, on the other hand, the situation was quite different. Defendant and her late husband, as prospective purchasers of the subject property, had at their disposal ample means of informing themselves of all of the considerations, legal and otherwise, which might have had an effect on the wisdom of their decision. Rather than availing themselves of the full range of these means, however, they apparently

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[14]As we pointed out in the *Klopping* case, such a means was later provided by the 1971 addition of former section 1243.1 (now §1245.260) to the Code of Civil Procedure.

chose to limit their inquiry to those considerations relating to the feasibility of proceeding with their plans in light of applicable zoning and building codes. In so doing they wholly neglected to inform themselves on the current state of the common law and its possible effect on the property they proposed to purchase. Had they done otherwise, of course, they would quickly have been made aware of our then recent *Gion-Dietz* decision and the principles on which it was based.

Defendant would seem to suggest, however, that the governmental plaintiffs herein were under an obligation to advise her and her husband in this matter, and that it is the breach of this obligation which resulted in her losses. We do not believe, however, that defendant may so easily divert the responsibility for her own inattention. We are aware of no authority which requires a government entity, on pain of an award of damages against it, to furnish a legal opinion concerning the possible effect of an appellate decision to persons proposing to purchase property whose title may be affected thereby.

VI.

We close with a formal matter. As has been indicated above, the judgments herein quieted title in the subject public easement in defendants both for themselves and as trustees for the people. Although we have concluded that plaintiffs have standing to assert the public right as trustees for the people, we see no basis in this record for determining that they have any rights in the subject easement other than those which they are adjudged to hold as public trustees.[15] We so interpret and construe the judgments.

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[15]County, of course, presently is the holder of fee title to the underlying real property. (See fn. 3, *ante*.).

(See and cf. In re Marriage of Epstein (1979) 24 Cal.3d 76, 87-89, 92.).

The motion of County to dismiss the appeal herein is denied. The judgments, which we interpret and construe to quiet title in the subject public easement in plaintiffs as trustees for the people of the State of California, are and each of them is affirmed.

MANUEL, *J.*

We Concur:
BIRD, *C.J.*
TOBRINER, *J.*
MOSK, *J.*
RICHARDSON, *J*,
NEWMAN, *J.*

Dissenting Opinion by Clark, J.

I dissent.

Gion-Dietz Gion v. City of Santa Cruz (1970) 2 Cal.3d 29) declared substantial law without adequate discussion, repudiated settled principles applicable to claims of dedication by adverse use, ignored constitutional guarantees of property rights, established an inequitable doctrine punishing the unselfish, and promulgated a rule counterproductive to the policy sought to be served. The Legislature repudiated *Gion-Dietz* in large part. We should acknowledge the court's mistake and overrule the case.

Prior to *Gion-Dietz* no case held dedication of an easement occurred by adverse use for recreation, and substantial reason existed to believe that use could ripen into fee title only following compliance with statutory requirements for adverse possession. All cases had rejected claims a right to recreational use was acquired by prescription. Because the undefined public easement for recreation would deprive an owner of practically all use of his land, a dedication for recreational use would be equivalent to transfer of the fee. Civil Code section 802 enumerating servitudes which may be granted upon land does not include a recreational easement. In cases involving implied and express dedication of an interest in land for use as a park, courts had always held the full fee interest was transferred, the owner losing all right to possession. Finally, deeds purporting to create public easements for park purposes were held to convey fee interest so that grantors or their successors were precluded from making any use of the property, even one consistent with the purported easement, such as selling refreshments. (E.g., Slavich v. Hamilton (1927) 201 Cal. 299, 305-306; Archer v. Salinas City (1892) 93 Cal. 43, 51; Morse v. E.A. Robey Co. (1963) 214 Cal.App.2d 464, 469-470.)

The combination of statutory exclusion, park dedication cases, and denial of owner use, told us that a general public right to use private property for recreational purposes could not be acquired by prescription but rather only by compliance with requirements of adverse possession—substantial enclosure, cultivation, or improvement of the property. (Civ. Code, § 325.)

Prior to *Gion-Dietz,* public use of open and unenclosed land was considered a license from the owner rather than an intention to dedicate. The presumption of license applied where the use by the public is not over a definite and specified line, but extends over the entire surface of the tract. [Citation.] It will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically destroy his own right to use any part of the property. [Citations.)'' (F.A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436, 448.) Like *Gion-Dietz, Hihn* involved public use of beach property. But the court concluded that the public did not obtain rights by adverse use or dedication. *Hihn* was followed in Manhattan Beach v. Cortelyou (1938) 10 Cal.2d 653, 688; Whiteman v. City of San Diego (1920) 184 Cal. 163, 172; and City of San Diego v. Hall (1919) 180 Cal. 165, 167-168.

A different rule was applied to roads where public use for more than the prescriptive period with knowledge of the owner and without permission or objection established dedicatory intent by the owner. (Union Transp. Co. v. Sacramento County (1954) 42 Cal.2d 235, 240-241 (citing numerous cases).) In road cases the public ordinarily is deemed to make the same use as the owner, the road is sharply defined and determination of a prescriptive right of way has not been deemed to deprive the owner of all use of his property. Additionally, roads are often expressly dedicated

to the public. (O'Flaherty, *This Land is My Land: The Doctrine of Implied Dedication to California Beaches* (1971) 44 So.Cal.L.Rev. 1072, 1101-1102.) Finally, road use is often adverse to the owner either because the road is built by others or because others' use of an existing road increases the owners' burdens of repair and maintenance.

Hihn and similar cases placed the burden on those claiming dedication by prescription to negate the presumed license by showing circumstances in addition to mere public use. To establish dedication by prescription prior to *Gion-Dietz*, all cases required continuous use and many required the use be adverse. (*Id.*)

In *Gion-Dietz*, this court announced a new doctrine of public easement for recreational use acquired by prescription. The court ignored the purported easement was equivalent to transfer of fee and did not even discuss requisites of obtaining title by adverse possession.[1] Absence of such an easement from the enumeration of easements in section 802 and the park purpose cases were dismissed in a cryptic footnote. (2 Cal.3d 29, 44-45, fn. 7.)

Gion-Dietz utilized the rule theretofore applied to road easement cases to establish dedication of open and unenclosed property. The presumption that public use of such property was derived by license from the owner was for the first time rejected, and the burden was placed on the landowner to establish the license. Further, the court held the fact use permission was given to some but not to all members of the public was insufficient to establish the license. (2 Cal.3d at p. 44.)

The court proclaimed: "We will not presume that owners of property today knowingly permit the general public to

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[1]A private easement for recreational purposes obviously would not have the effect of transferring fee.

use their lands and grant a license to the public to do so." (2 Cal.3d at p. 41.) The court concluded that if "the owner has not attempted to halt public use in any significant way . . . it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication." (*Id.*)

Gion-Dietz also repudiated the requirement of continuity in favor of sporadic use. (2 Cal.3d at p. 40.) And the traditional requirement of adversity was expressly eliminated, mere public use now being sufficient. "What must be shown is that persons used the property believing the public had a right to such use. This public use may not be 'adverse' to the interests of the owner in the sense that the word is used in adverse possession cases. If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of 'adversity' to support a decision of implied dedication." (2 Cal.3d at p. 39.)

Repudiation of prior authority and change from a doctrine based on adverse use to one of simple use was grounded on the court's announced preference for public recreation. (2 Cal.3d at pp. 42-43.) The court ignored the prohibition against taking property for public use without just compensation reflected in the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 14 of our state Constitution.

Commentators' reaction to the per curiam opinion was immediate and striking. Edward L. Lasher, writing in the State Bar Journal called it a "bombshell." (46 State Bar J. 13, 16 (1971).) Assistant Attorney General Shavelson, head of the land law section, termed it an "earthquake of major proportions in California real property law." (Shavelson, *Gion v. City of Santa Cruz: Where Do We Go From*

Here? (1972) 47 State Bar J. 415.) With characteristic precision and understatement, Bernard E. Witkin referred to the decision as "innovative," pointing to critical commentary and immediate legislative repudiation. (3 Witkin, Summary of Cal. Law (1973) pp. 1834-1836.).

Commentators were severe in their criticism of *Gion-Dietz*, noting not only departure from precedent,[2] the failure to consider total loss to the owner, and the prohibition of taking property without compensation, but also that the case created an obvious inequity and would prove counterproductive to the public policy espoused. (Armstrong, *Gion v. City of Santa Cruz; Now You Own It—Now You Don't; or The Case of the Reluctant Philanthropist* (1970) 45 L.A. Bar Bull. 529; Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz* (1971) 8 Cal.Western L.Rev. 75; Comment, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches* (1971) 44 So.Cal.L.Rev. 1092; Com-

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[2]The majority's attempted reliance in the instant case upon O'Banion v. Borba (1948) 32 Cal.2d 145 and Morse v. Miller (1954) 128 Cal.App.2d 237, to establish precedent for *Gion-Dietz* fails. *O'Banion* neither mentions nor impliedly overrules Hihn. *O'Banion* was a prescriptive easement case dealing with roads in which the court did away with the presumption of adversity arising from open, continuous, notorious and peaceable use for the preseciptive period in favor of treating the issue as "one of fact, giving consideration to all circumstances and the inferences that may be drawn therefrom." *Id.*, at p. 149.) *Hihn,*, which is not mentioned in *O'Banion*, involved a presumption of license where public use is over open land, not a roadway. Moreover, *O'Banion* did not specifically address the issue of burden of proof of license, and did not suggest that the landowner had the burden to prove license rather than a burden to prove adversity upon those claiming public use.

Morse recognized a recreational beach easement but the easement was *implied in fact* rather than prescriptive. In that case, a subdivider selling lots represented that the beach and athletic field would be open to use, and the court held that his statements constituted an implied dedication. While the court earlier in its opinion spoke of prescriptive dedication, this was by way of illustration, and furnishes no basis for a conclusion that mere use is sufficient to obtain a prescriptive recreational easement.

ment, *A Threat to the Owners of California's Shoreline* (1971) 11 Santa Clara Law. 327; Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication* (1971) 18 UCLA L.Rev. 795; Note, *Californians Need Beaches—Maybe Yours! (1970) 7 San Diego L.Rev. 605; Note, Implied Dedication in California: A Need for Legislative Reform* (1970) 7 Cal.Western L.Rev. 259; Note, *The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owner* (1971) 4 Loyola U.L.Rev. 438; Note, *Public Access to Beaches* (1970) 22 Stan.L.Rev. 564; Note (1971) 59 Cal.L.Rev. 231.)

The inequity addressed by commentators appears when weighing penalties against rewards to landowners having no immediate use for their property so that permitting public use poses no interference or impairment. Those landowners who were neighborly and hospitable in permitting public use were penalized by *Gion-Dietz* by loss of their land, while those excluding the public by fencing or other means were rewarded by retention of their exclusive use. While virtue is usually its own reward, the law does not usually penalize the virtuous.

The decision was asserted to be counterproductive because landowners to avoid prescriptive dedication would now exclude the public from using open and unimproved property for recreation purposes. Thus the very policy sought to be furthered would be defeated. (County of Orange v. Chandler-Sherman Corp. (1976) 54 Cal.App.3d 561, 564 points out that one of the reactions to *Gion-Dietz* was "soaring sales of chain link fences.")

The Legislature quickly and decisively repudiated the factual assumption of *Gion-Dietz*. (Stats. 1971, ch. 941, 1845.) Whereas in *Gion-Dietz* this court announced, "We will not presume that owners of property today knowingly

permit the general public to use their lands and grant a license to the public to do so'' (2 Cal.3d at p. 41), the Legislature concluded that California landowners are far more charitable and neighborly. Following our 1970 opinion in *Gion-Dietz,* the Legislature expressly stated in 1971 that: ''The Legislature finds that: (1) It is in the best interests of the state to encourage owners of private real property to *continue* to make their lands available for public recreational use . . . .'' (Civ. Code, § 1009, subd. (a); italics added.) Further findings by the Legislature make it abundantly clear we should not require property owners, by rules creating prescriptive dedication, to become less charitable and neighborly.[3]

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[3]Civil Code section 1009 provides: ''(a) The Legislature finds that: [¶] (1) It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use to supplement opportunities available on tax-supported publicly owned facilities. [¶] (2) Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes. [¶] (3) The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property. [¶] (b) Regardless of whether or not a private owner of real property has recorded a notice of consent to use of any particular property pursuant to Section 813 of the Civil Code or has posted signs on such property pursuant to Section 1008 of the Civil Code, except as otherwise provided in subdivision (d), no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use, made by the owner thereof in the manner prescribed in subdivision (c) of this section, which has been accepted by the county, city, or other public body to which the offer of dedication was made, in the manner set forth in subdivision (c). [¶] (c) In addition to any procedure authorized by law and not prohibited by this section, an irrevocable offer of dedication may be made in the manner prescribed in Section 7050 of the Government Code to any county, city, or other public body, and may be accepted or terminated, in the manner prescribed in that section, by the county board of supervisors in the case of an offer of dedication to a county, by the city council in the case of an offer of dedication to a city, or by the governing board of any other public body in the case of an offer of dedication to such body. [¶] (d) Where a governmental

Additional provisions of section 1009 and the 1971 amendment to Civil Code section 813 (Stats. 1971, ch. 941, p. 1845, § 1) clearly reflect the legislative judgment that the policy of public access to recreational areas is best served by encouraging landowners to allow the public to use their land. Section 1009, subdivision (b), provides: ". . . except as otherwise provided in subdivision (d), no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any govern-

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entity is using private lands by an expenditure of public funds on visible improvements on or across such lands or on the cleaning or maintenance related to the public use of such lands in such a manner so that the owner knows or should know that the public is making such use of his land, such use, including any public use reasonably related to the purposes of such improvement, in the absence of either express permission by the owner to continue such use or the taking by the owner of reasonable steps to enjoin, remove or prohibit such use, shall after five years ripen to confer upon the governmental entity a vested right to continue such use. [¶] (e) Subdivision (b) shall not apply to any coastal property which lies within 1,000 yard inland of the mean high tide line of the Pacific Ocean, and harbors, estuaries, bays and inlets thereof, but not including any property lying inland of the Carquinez Straits bridge, or between the mean high tide line and the nearest public road or highway, whichever distance is less. [¶] (f) No use, subsequent to the effective date of this section, by the public of property described in subdivision (c) shall constitute evidence or be admissible as evidence that the public or any governmental body or unit has any right in such property by implied dedication if the owner does any of the following actions: [¶] (1) Posts signs, as provided in Section 1008, and renews the same, if they are removed, at least once a year, or publishes annually, pursuant to Section 6066 of the Government Code, in a newspaper of general circulation in the county or counties in which the land is located, a statement describing the property and reading substantially as follows: 'Right to pass by permission and subject to control of owner: Section 1008, Civil Code.' [¶] (2) Records a notice as provided in Section 813. [¶] (3) Enters into a written agreement with any federal, state, or local agency providing for the public use of such land. [¶] After taking any of the actions set forth in paragraph (1), (2), or (3), and during the time such action is effective, the owner shall not prevent any public use which is appropriate under the permission granted pursuant to such paragraphs by physical obstruction, notice, or otherwise. [¶] (g) The permission for public use of real property referred to in subdivision (f) may be conditioned upon reasonable restrictions on the time, place, and manner of such public use, and no use in violation of such restrictions shall be considered public use for purposes of a finding of implied dedication."

mental body or unit a vested right to continue to make such use permanently, in the absence of an express irrevocable offer of dedication of such property . . . .'' Subdivision (d) permits dedication by prescription where governmental entities have improved, maintained or cleaned the land by expenditure of public funds. Thus, the general rule in California is again that, absent public improvement or maintenance, the gracious landowner who permits the public to use his property is in no worse position than he who excludes the public.

While section 1009, subdivision (e), exempted from subdivision (b)'s prohibition of prescriptive dedication certain oceanside properties, subdivision (f) provides: ''No use, subsequent to the effective date of this section, by the public of property described in subdivision (e) shall constitute evidence or be admissible that the public or any governmental body or unit has any right in such property by implied dedication if the owner does any of the following actions.'' Included in the actions an owner may take are posting signs disclaiming dedication once a year of more, publish disclaimer notices annually, or record a disclaimer revocable notice pursuant to Civil Code section 813. These provisions make clear that contrary to *Gion-Dietz*, owner conduct is not to be ignored in determining prescriptive dedication.

At the time *Gion-Dietz* was decided Civil Code section 813 provided the owner of property could protect his interest by recording a notice providing that the right of the public or any person to use the property was by permission. Recordation of such notice constituted evidence of permissive use. *Gion-Dietz* ignored this section. The 1971 amendment made the recordation conclusive evidence of permission, and further provided the permission ''may be conditioned

upon reasonable restrictions on the time, place, and manner of such public use, and no use in violation of such restrictions shall be considered public use for purposes of a finding of implied dedication."

Not only has the Legislature rejected the *Gion-Dietz* assumptions but it has also rejected our proclamation that public use alone without regard to landowner conduct is sufficient to warrant a finding of prescriptive dedication. As to the noncoastal properties, prescriptive dedication is available only where governmental agencies have improved, maintained or cleaned the land by expenditure of public funds. As to the coastal properties, landowners may easily avoid the effect of *Gion-Dietz* by recording notices, or annually posting or publishing notices.

For the future all that remains of *Gion-Dietz* as to coastal properties is a trap for the unwary landowner, the one unaware of his right to record, post or publish notice. We should recognize this court's mistake and eliminate the trap by overruling *Gion-Dietz*.

CLARK, *J*.

APPENDIX B. Judgment.

Supreme Court of the State of California.

County of Los Angeles, Plaintiff, Cross-Defendant and Respondent, v. Shirley Berk, Individually and as Executrix, etc., Defendant, Cross-Complainant and Appellant. City of Torrance, Plaintiff and Respondent, v. Shirley Berk, Individually and as Executrix, etc., Defendant and Appellant. L. A. No. 31099.

Appeal, County of Los Angeles, Superior Court No. 999043 & SWC 19574.

The above-entitled cause having been heretofore fully argued, and submitted, It is Ordered, Adjudged, and Decreed by the Court that the Motion of County to Dismiss the Appeal Herein in the above-entitled cause, is hereby Denied. The Judgments, Which We Interpret and Construe to Quiet Title in the Subject Public Easement in Plaintiffs as Trustees for the People of the State of California, are and Each of Them is Affirmed. Respondents are to Recover Their Costs on Appeal.

I, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 24th day of January, 1980.

Witness my hand and the seal of the Court, this 13th day of March, 1980.

Deputy
G. E. Schneider

APPENDIX C.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California, 94102

Order March 13, 1980, Rehearing Denied.

In re: L.A. No. 31099, County of Los Angeles, et al. vs. Berk, et al.

Respectfully,
G. E. Bishel,
Clerk

APPENDIX D. Modification of Opinion.

In the Supreme Court of the State of California.

County of Los Angeles, Plaintiff, Cross-defendant and Respondent, v. Shirley Berk, Individually and as Executrix, etc., Defendant, Cross-complainant, and Appellant. City of Torrance, Plaintiff and Respondent, v. Shirley Berk, Individually and as Executrix, etc., Defendant and Appellant. L.A. 31099, Super.Ct. Nos. 999043 and SWC 19574.

Filed: Mar. 13, 1980.

BY THE COURT:

It is ordered that the opinion filed herein on January 24, 1980, and reported in the Official Reports (26 Cal.3d 201), be modified in the following particulars: The second full paragraph on page 209, extending through the first three lines on page 210, is deleted, and the following paragraph is inserted in its place:

The City Attorney of Torrance, although he became aware of the *Gion-Dietz* decision soon after it appeared in the advance sheets, was initially uncertain whether its application in Torrance would be limited to sandy beach areas or would extend as well to slope and bluff areas of beach property. He did not then communicate with the planning and building departments concerning the decision and its possible implications. In June 1970 he assigned a deputy to investigate the possibility of filing actions on beach properties in Torrance, and in September of the same year he recommended to the city council that actions be commenced on certain shoreline properties to establish public recreational easements therein. However, no action was recommended concerning the Torrance portion of the property here in question because the deputy who prepared the letter seeking authorization for suit was under the impression that the parcel in question was county property.

APPENDIX E. The Opinion of the Court of Appeal of the State of California.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

County of Los Angeles, etc., Plaintiffs, Cross-Defendants and Respondents, vs. Shirley Berk, individually and as Executrix of the Estate of OSCAR BERK, et al., Defendants, Cross-Complainants and Appellants. City of Torrance, etc., Plaintiffs and Respondents, vs. Shirley Berk, individually and as Executrix of the Estate of OSCAR BERK, et al., Defendants and Appellants. 2 Civ. Nos. 45732, 45573. Super. Ct. Nos. 999 043 SW C 19574.

Filed: Jan. 19, 1979.

APPEALS from judgment of the Superior Court, Los Angeles County. Richard S. Schauer, Judge. Affirmed in part; reversed in part.

Fadem, Berger & Norton and Michael M. Berger for Cross-Defendant, Complainant and Appellant Shirley Berk.

John H. Larson, County Counsel and Charles Vinson Tackett, Deputy County Counsel, for Plaintiff, Cross-Defendant and Respondent County of Los Angeles.

Stanley E. Remelmeyer, City Attorney and A. D. "Jack" Allen, for Plaintiffs and Respondents City of Torrance.

Evelle J. Younger, Attorney General, N. Gregory Taylor and Robert H. Connett, Assistant Attorneys General, and Katherine E. Stone, Deputy Attorney General, as amici curiae on behalf of the State Lands Commission and California Coastal Commission of the State of California.

In March 1971, the City of Torrance, a municipal corporation, and the County of Los Angeles, as trustees for the

public, brought separate actions to establish public beach recreation easements on certain beach property located in Los Angeles County and owned by Oscar and Shirley Berk. Named as defendants, in addition to the Berks, were persons alleged to have security interests in the property. These included United California Bank, Fidelity Federal Savings and Loan Association, and J. Halperin & Co. of California, Inc. and John Halperin.

The City of Torrance filed its action on March 12, 1971, and the County of Los Angeles filed its action on March 23, 1971. The theory asserted in each complaint was that the public, for a period of at least five years preceding the action, had made uninterrputed and continuous use of the property for recreational purposes, with full knowledge of all successive owners of the property and without asking or receiving permission to do so from the owners. The legal theory of plaintiffs' actions rested on the doctrine that there had been an implied dedication of the parcels of property for public recreational use.

The plaintiffs' theory of the *recreational* easement in beach or shoreline property by implied dedication was derived from the companion cases of *Gion v. City of Santa Cruz* and *Dietz v. King* (hereinafter *Gion-Dietz,*) decided together in one opinion by the California Supreme Court on February 19, 1970, and reported in 2 Cal.3d 29. In essence *Gion-Dietz* held that a public recreational easement in shoreline or beach property would be created under the legal principle of an implied dedication of property upon a showing of public use of the land for recreational purposes " 'for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone.' " (*Gion-Dietz, supra,* 2 Cal.3d 29, 43.).

Answers and cross-complaints were filed by the Berks and other defendants. In their amended answers, the Berks asserted a number of affirmative defenses, including the defenses of estoppel and laches. In their cross-complaints against plaintiffs, the Berks sought declaratory relief that no public easement existed and also sought money damages on various theories, including slander of title, inverse condemnation and unjust enrichment.[1]

The actions were consolidated for trial. After trial by the court, judgments were rendered in favor of the plaintiffs against the defendants on the complaints and in favor of plaintiffs as cross-defendants on the cross-complaints of the Berks.

Appeals were taken by all defendants. The court has dismissed the Halperin appeal because Halperin did not pursue it. Except for the appeal of the Berks, the court has also dismissed the appeals of the other defendants at the latters' request. Defendant Oscar Berk died while the appeals have been pending, and defendant Shirley Berk is now the appellant on her own behalf and as executrix of the estate of her husband, Oscar Berk.

I.

The Preliminary Issue of Whether the Berks' Appeals Should Be Dismissed as Moot.

A preliminary issue raisedby the County of Los Angeles in its opening brief is whether or not the appeals of te Berks should be dismissed as moot. The County has also filed a formal motion to dismiss their appeals, accompanied by the affidavit of a deputy county counsel. The County asserts

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[1]The Berks also sought relief against other cross-defendants not parties in the actions brought by the City of Torrance and the County of Los Angeles; these claims were severed from the main action to be tried separately, and do not concern us here.

that, after the trial court's judgment, the Berks defaulted on their obligations with respect to the property in dispute, and United California Bank and Fidelity Federal Savings and Loan Association, holders of security interests in the property, foreclosed and eliminated the fee interest of the Berks. These parties then sold the fee interest in the property to the County of Los Angeles. The amounts paid by the County of Los Angeles to United California Bank and Fidelity Federal Savings were undisclosed. At oral argument we were told that the secured parties received 50 percent of the amounts owed on the property from the County of Los Angeles, in return for conveyance of the fee.

The County advances the contention that, since Shirley Berk no longer has any interest in the property, she had no substantial interest to be adjudicated here. As a consequence, the Berks' appeals should be dismissed.

A review of the trial court's judgments requires exploration not only of the imposition of a public easement on the subject property but of the denial of the defendant Berks' claims for equitable relief set forth in their cross-complaints. In *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 58, the court observed, with respect to a plaintiff therein whose land had been taken by foreclosure after suit had been filed, that "[c]ertainly this fortuity [foreclosure] does not preclude [plaintiff] from recovering from any damages caused by the city . . . ." Similarly in the case before us, defendant Berk is not precluded from seeking monetary redress for the loss of the subject property. We therefore decline to dismiss her appeals.

II.

The Procedural and Factual Background.

The property in dispute consists of slightly less than two acres of vacant shoreline land situated in the cities of Re-

dondo Beach and Torrance. Parcels 1-B, 8 and 9 are in Redondo while parcel T is in Torrance; all are contiguous and there are no visible artificial boundaries between them. Included are sandy beach areas, some steep slopes and considerable acreage on a bluff overlooking the Pacific Ocean. The beach portion does not extend to the mean high tide line, but is surrounded by publicly owned beach, some of which lies between the property in question and the ocean. From the bluff the view both to the north and south is unique — in the words of a witness, "breathtaking." Suffice it to say that, by 1970, the property was immensely valuable.

In the 1920's, the property (including an additional parcel, S, located seaward of parcel T) was acquired by the Huntington Redondo Company, the developer of a neighboring residential area, the Hollywood Riviera tract. A private beach club was constructed on parcels T, 8 and 9 in 1928, and was used by the owners of Hollywood Riviera tract homes. After the depression years, a successor of Huntington Redondo distributed shares of ownership to the property among the home owners in the Hollywood Riviera tract. In 1947, these owners sold parcel 1-B, located in Redondo Beach, to the County of Los Angeles. In 1958, the club house burned to the ground; the only evidence of the structure remaining consisted of steps from the bluff to the beach below.

In 1963, parcels T, S, 8 and 9 were sold to a real estate developer, Keillor. It was Keillor's plan to construct a highrise condominium on the property. Pursuant to a business license obtained from the City of Torrance, Keillor placed a small real estate office on parcel T. The office was removed to a nearby location in 1965. Keillor engaged in a public promotional program to persuade local residents of the merits of his highrise project. He encountered strong — and effective — opposition from members of the Hol-

lywood Riviera Homeowners' Association, a group of local citizens interested in preserving their residential area for low-density housing. Keillor sought a variance from the City of Torrance to permit the construction of his highrise, but, after a widely attended public meeting, the city council of that city denied his request in 1964.

Stymied in Torrance, Keillor then concentrated on development of parcels 8 and 9, located in Redondo. In 1965, he also negotiated an exchange of parcels with the County of Los Angeles, In return for parcel S, located in Torrance, Keillor received parcel 1-B in Redondo. This exchange had been approved by the Board of Supervisors of Los Angeles County after holding public hearings pursuant to Government Code section 25365.

Subsequent to the exchange, the County obtained from Keillor a right of entry over a portion of parcel 1-B so that the County could more easily replenish and maintain the surrounding beaches which it owned. During 1967 and 1968, Keillor permitted a private concern, Shellmaker's Inc., to store materials on parcel T in Torrance while performing a beach widening project seaward of the property pursuant to a contract with the County of Los Angeles and the United States Army Corps of Engineers.

Keillor, unable to arrange adequate financing for his development efforts, defaulted on a note payable to United California Bank; payment was secured by a deed of trust on the property. Keillor filed a bankruptcy petition in federal district court. The property was in receivership for approximately a year; then foreclosure was effected in November 1969, by another trust deed holder, Halperin.

Halperin, as the owner of the property, began negotiating for the sale of parcel T in Torrance to a group of developers (referred to herein as the Meister group). An escrow was

opened and some preliminary planning and investigation was undertaken by the Meister group. On behalf of the Meister group, an architect, Cobb, engaged in discussions with officials of the Planning and Building Department of the City of Torrance. It became clear that there would be strong local opposition to any building plan on the property that would require a variance from the existing zoning and building restrictions. The Torrance City Council turned down the Meister group's request for a density variance in July 1970, and the escrow terminated.

In May or June 1970, defendant Oscar Berk, a businessman with many years of experience as a building contractor, was approached by a real estate agent concerning parcels 1-B, 8 and 9, located in Redondo Beach, and offered for sale by Halperin. Berk viewed the parcels in June 1970. He examined the County Tax Assessor's records, and visited the appropriate departments of the City of Redondo Beach to acquaint himself with the zoning and building requirements which he would have to meet in order to build on the Redondo property. Berk then became aware that the adjoining parcel, T, in Torrance, was also for sale; he knew that that property had been in escrow and conducted an investigation into the reasons the Meister group had been unable to proceed with their plans for the property. Berk learned of the strong influence exerted by the local homeowners; he discussed development problems with various planning and building officials of the City of Torrance. He was advised that the property was zoned R-3, and that development would only be possible if he could create a plan which would not require any variances. Perusal of the minutes of Torrance City Council meetings bore out Berk's impression that the Meister group had failed to pursue their project because of their need for an increased density variance. Berk concluded that he could build within the frame-

work of the existing requirements without the need for special dispensation by the Torrance City Council. Berk then drew plans for an apartment complex utilizing both the Redondo and Torrance parcels.

Having assurance from the planning and building officials of the cities of Torrance and Redondo Beach that his building project would not require variances from the applicable zoning and building requirements, Berk offered to purchase the property from Halperin for $600,000. Halperin accepted this offer and a purchase and sale escrow was opened in July 1970. As the escrow progressed, Berk continued his discussions with city officials in both Redondo and Torrance; the emphasis was not upon whether he could build at all, but in what manner he would build. Sums were expended for plans and fees paid to the cities involved.

The escrow closed on September 28, 1970. Berk — now the owner of the property — continued to discuss his project with city officials of Torrance and Redondo Beach throughout the year 1970. By November 1970, Berk had obtained a building permit from Redondo Beach. In February 1971, construction began on the Redondo property and Berk made official application for a building permit from the City of Torrance. The governmental response was immediate. Both the City of Torrance and the County of Los Angeles filed suits to establish public easements on the property — the City of Torrance with respect to parcel T and the County of Los Angeles with respect to the remainder. An injunction was obtained which prevented further construction of the Berk project until the issues had been resolved by litigation.

III.

New Law Forged by the Gion-Dietz Decision.

On February 19, 1970, the California Supreme Court rendered an important and far-reaching decision in the two

cases previously referred to herein as *Gion-Dietz*. This decision encouraged the assertion of public recreational easements on shoreline property. The decision was the subject of considerable publicity and considerable comment (much of it adverse) in law journals. The *Gion-Dietz* decision became known to Torrance City Attorney Stanley E. Remelmeyer almost immediately after it appeared in the advance sheets. The impact of *Gion-Dietz* upon shoreline property in Torrance became the subject of discussion among members of the City Attorney's office. Remelmeyer testified at the trial that he was initially uncertain whether public easements could successfully be asserted on sandy beach areas only, or, could also be established with respect to the slopes and bluffs of beach property. He did not officially communicate his interest in pursuing this matter to members of the planning and building departments of the City of Torrance while the Meister group attempted to secure official approval of their development plans for parcel T.

Berk had not learned of *Gion-Dietz* nor its possible application to the property here involved, nor did any of the public officials of the cities of Torrance or Redondo with whom he dealt prior to his purchase of the property advise him of the decision or the rule of law announced therein or of any possible effects on the validity of the fee title interest in the property involved. Still, by the time of the close of the Halperin-Berk escrow, the City of Torrance had filed several *Gion-Dietz*-type actions against property on the city's shoreline, but did not take any action against the property in question here.

IV.

Sufficiency of the Evidence to Establish a Public Recreational Easement by Implied Dedication in the Property in Question Within the Meaning of Gion-Dietz.

A. In General.

At the trial herein, plaintiffs presented ample evidence of public use of the property in dispute from early in the century. Defendant Berk assails the quality of the evidence presented below on this issue, noting that much of the testimony emanated from members of the local homeowners' association which had opposed development of the site for many years. We note, however, the appropriate standard of appellate review: "In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]. All issues of credibility are likewise within the province of the trier of fact." (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.) We also call attention to the fact that, while members of the homeowners' association testified concerning their *own* use of the subject property on a daily basis, they *also* testified to the continuous use of the property by members of the general public.

We need only briefly summarize the evidence on this point. That portion of the Berk property located on the sand was used by thousands of persons annually — persons engaged in all of the recreational pursuits generally associated with the seashore. Access to the sand and surf was achieved not only from the surrounding public beaches but via the slope and the stairs which remained from the days of the private beach club. On the bluff, persons viewed the sunset,

walked their dogs, camped, painted and photographed the view. The use was diverse; children played; teenagers reveled; older people tended to be spectators. Occasional ineffective efforts to curtail these encroachments were made by prior owners. Signs were torn down and chains were removed; no fencing was attempted after the club house fire. Keillor referred to the visitors in the sixties as the "multitudes." While various interested persons debated the proper development of the property throughout the years, the public proceeded to use the property for recreational purposes. As a result, clearly defined paths were worn on the bluff and slope.

There was evidence that, for 25 years before 1970, the County of Los Angeles had been maintaining the sand, slope and bluff area of the property as if it were publicly owned; cleaning it regularly of the debris generated by the public use. Berk visited the property a number of times in the summer of 1970, and must have been cognizant of the public present. But what was reasonably unknown to him was the effect the public presence would have on his private property interest.

In its findings of fact and conclusions of law, the trial court specifically declared that public use by diverse numbers of the public had been established; as to the Torrance property and parcels 8 and 9 in Redondo, the use had commenced in 1958, after the club house fire, and had continued in uninterrupted fashion until 1963, when Keillor acquired it. As to parcel 1-B, in Redondo, the public use had commenced in 1965, after the exchange with the County of Los Angeles, and had ripened into a public easement in 1970, shortly before the Halperin-Berk escrow had closed. The court concluded that there was "an implied dedication of property rights for beach and shoreline recreational uses"

to the public, represented in the within actions by the governmental plaintiffs.

In arriving at judgment, the trial court expressed some dissatisfaction with the result it felt was compelled by the evidence and the applicable law. The Berks, the court concluded, had been caught by a change in the law which resulted in their ownership of prime beach property subject to a public easement destroying any possibility of private development or use. By the judgments, entered on February 26, 1973, the Berks retained the fee — and the obligation to pay taxes on the property, but little else.

B. Is the Rule of Law Announced in Gion-Dietz Limited to the Factual Situations Presented There?

On this appeal, defendants argue that *Gion-Dietz* should be narrowly construed, and limited to factual situations similar to those involved in that decision.

In *Gion,* the property in dispute consisted of three parcels of shoreline property, including bluff land with a sharp drop to the sea. No permanent structures had ever been placed on the land. It had been used by the public for recreational purposes without any effective interference by its successive owners since 1900. In addition, there was evidence that the City of Santa Cruz had expended substantial sums for maintenance of the property for many years. *Dietz* involved a beach and an access road, used by the public for 100 years. In both cases, the California Supreme Court concluded that there had been an implied dedication for public recreational purposes. A fair reading of the decision, however, compels the conclusion that the principles of law discussed in that decision are of *broad,* rather than narrow, application.

The *Gion-Dietz* decision was based upon "the strong policy expressed in the Constitution and statutes of this state of encouraging public use of shoreline recreational areas."

(*Gion-Dietz, supra,* 2 Cal.3d 29, 42.) The crucial factual determination to be made in such cases is "whether the public had used the land 'for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone.' " (*Id.* at p. 38.) It is not necessary to establish specific adverse intent to possess the land on the part of the public, nor is a separate finding of "adversity" required, if use without objection or interference is established. Evidence of maintenance of the property by a governmental entity is significant in showing public use; the use must be for recreational purposes, and by diverse members of the public.

To negate a finding of implied dedication by such use, the owner must present affirmative evidence showing that the use was pursuant to license, or that bona fide attempts were made to prevent public incursion. The quality of such attempts is a factual matter, but "[i] the owner has not attempted to halt public use in any significant way . . . it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication." *Gion-Dietz, supra,* 2 Cal.3d 29, 41.)

As to the problems which might arise as the result of changing ownership of the land in dispute, the court held that "[n]othing can be done by the present owners to take back that which was previously given away." *Gion-Dietz, supra.* 2 Cal.3d 29, 44.)

Defendant points out that factual distinctions from *Gion-Dietz* may be found in the case at bench. Among them are the topography of the land, the existence of a permanent structure — the club house — for a long period of time, as well as assertedly slight evidence of maintenance by

public agencies. In addition, defendant points out that, in *Gion-Dietz*, the owners had not only ignored their properties for long periods of time but conceded at trial that the public had made use of them; that such was not the case herein, as there were sporadic attempts to curtail the public use, and public controversy over the development of the property had raged for years in the local community. Upon analysis, however, these are distinctions without a difference. No suggestion appears in *Gion-Dietz* that would limit that ruling to property with similar topography or history to that involved in the 1970 decision. As we have concluded, there was substantial evidence of public use of all of the parcels involved here.

In two subsequent cases involving the *Gion-Dietz* rule of law, the Courts of Appeal did find *relevant* the factual distinctions and rejected its application. In *County of Orange v. Sherman Corp.* (1976) 54 Cal.App.3d 561, dedication was sought concerning an isolated beach near Laguna; the trial court's finding that the evidence did not establish use by sufficient members of the public was upheld on the ground that the public use envisioned by *Gion-Dietz* must be "substantial." In *Richmond Ramblers Motorcycle Club v. Western Title Guaranty Co.* (1975) 47 Cal.App. 3d 747, the court declined to find public dedication of an area long used by members of a motorcycle club, as well as their families and friends, because their presence on the land was the result of a license conferred by the owner.

However, in *City of Long Beach v. Daugherty* (1977) 75 Cal.App.3d 972, the plaintiff city successfully invoked *GionDietz* to obtain public easements over beach-front property located in the city and long maintained by the city and subject to intense public use.

C. For Gion-Dietz to Apply, Must There Be Specific Proof That the Public Who Used Beach Property Believed That the Public Had a Right to Such Use?

Defendants argue that the evidence adduced below in the case at bench was insufficient to show use by the public "believing the public had a right to such use." This language was employed by the court in *Gion-Dietz* but was followed by an explanation that the existence of such belief is immaterial if the public use is established for the requisite period of time. *Daugherty, supra*. 75 Cal.App.3d 972, 979.) Accordingly, we reject this argument of defendant.

D. Other Contentions Raised by Defendant Regarding Insufficiency of the Evidence.

Defendant questions whether a public easement may be established by use which involved the violation of various ordinances and penal statutes. Acquisition of title by adverse use, however, as it was recognized at common law, has always involved the violation of some law protecting ownership — the prohibition against trespass, for example — but that reality has not prevented an owner's acquiescence from creating title in another, whether he be a wrongdoer or not.

Defendant also makes certain technical arguments based upon traditional rules of real property, citing cases which have held, in the past, that adverse possession can create no prevailing rights against the holders of secured interests in property or such entities as receivers in bankruptcy, holding *in custodia legis*. Defendant points out that during the prescriptive periods identified by the trial judge in the case at bench, there were foreclosures of the property as well as a period when the property was subject to the jurisdiction of the federal bankruptcy court. *Gion-Dietz*, of course, did

not discuss with any particularity the impact that breaks in the chain of title of the owners might have, except to state that, once the public easement had ripened, no subsequent owner could prevent assertion by the appropriate authorities. Resolution of this issue depends upon whether the correct emphasis is upon the owner's title or upon the conduct of the encroaching public; we think that *Gion-Dietz* makes it abundantly clear that public use may commence and run against successive owners of property, and that it is immaterial how those owners acquired the property.

There are those who consider the *Gion-Dietz* rule of law harsh and inequitable. But we cannot refuse to follow this rule of law because of various personal opinions as to its fairness or harshness in spite of official and nonofficial reactions to *Gion-Dietz*. We recognize that it was cogently stated in *County of Orange v. Chandler-Sherman Corp., supra*, 54 Cal.App.3d 561, 564: "Reaction to *Gion-Dietz* was prompt. In addition to soaring sales of chain link fences, as owners of shoreline property frantically attempted to bar the public from the use of their property, the case generated a spate of law review comment which was generally critical." In addition, the California Legislature reacted promptly by amending Civil Code sections 813[2] and 1009[3] to provide the means by which private owners could protect their property against implied dedication while allowing public use. Such protection may now be obtained by: (1) sign posting as provided in Civil Code section 1008; (2) public recordation as provided in Civil Code section 813; and (3) a written agreement with a public agency for the public use of such land. Such agreement may impose "reasonable restrictions on the time, place, and manner of such public

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[2]Amended by Stats. 1971, ch. 941, § 1, p. 1845.
[3]Added by Stats. 1971, ch. 941, § 2 p. 1846.

use, and no use in violation of such restrictions shall be considered public use for purposes of a finding of implied dedication." (Civ. Code, § 1009, subd. (g).)

V.

Viability of the Defenses of Estoppel and Laches.

The Berks' answer raised the equitable defenses of estoppel and laches.

California law has long recognized the viability of the defense of equitable estoppel. Evidence Code section 623, restating former Code of Civil Procedure section 1962, subdivision 3, provides that "[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

"The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.)

"It is settled that '[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it. [Citations.]' Correlative to this general rule,

however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . .' [Citation.] The tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.)

"The existence of an estoppel is generally a question of fact for the trial court whose determination is conclusive on appeal unless the opposite conclusion is the only one that can reasonably be drawn from the evidence. [Citation.] When the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel is a question of law." (*Driscoll v. County of Los Angeles* (1967) 67 Cal.2d 297, 305.)

The Berk defendants assert that the plaintiffs should be estopped from claiming the public recreational easement because the County assessed and taxed the property as if it were private and not subject to a public easement and the officials of the cities of Torrance and Redondo Beach applied their zoning and building ordinances to the property on the assumption that the property was private and not encumbered with any public easement. There appears to be no dispute that such taxation and application of ordinances did occur, and that the governmental activity in this context did influence Oscar Berk's belief that the property was private property free of any claim that would encumber the fee interest.

The trial court rejected the defenses of estoppel and laches, making a specific finding that none of the governmental officials who dealt with the property had knowledge concerning its status. The evidence supports this finding. In the case at bench, there was no evidence that either County, or Torrance or Redondo Beach officials intention-

ally misled Oscar Berk concerning the status of the property, but misrepresentation of known facts need not be the product of fraudulent conduct in order to invoke estoppel. (*Mansell, supra.*) All of the officials did act upon the assumption that the property was free of public claim. There is no doubt if any of them had informed Berk of the possible consequences of *Gion-Dietz,* he would not have purchased the property from Halperin.

The evidence also supports the trial court's finding against the defense of laches. Laches refers to prejudicial delay, and must be considered in the context of reasonableness. The County and the City of Torrance acted to assert their claims to a public easement some 13 months after *Gion-Dietz* had been decided. We cannot conclude that, as a matter of law, this lapse of time constitutes laches.

VI.

Miscellaneous Contentions of the Berk Defendants.

A. The Retroactive Application of Gion-Dietz.

The *Gion-Dietz* court established a principle creating public recreational easements in shoreline property and applied it retroactively in the two cases it considered. Defendant argues that such application is lacking in fundamental fairness. As an intermediate appellate court, it is not within our jurisdiction to overrule a decision of the state's highest court. (See *Daugherty, supra,* 75 Cal.App.3d 972, 980, rejecting a similar argument.)

B. Does the Gion-Dietz Rule of Law Constitute a Taking of Private Property Without Compensation in Violation of Constitutional Principles?

The Berk defendants attack the *Gion-Dietz* rule of law on the ground that it permits the taking of private property in violation of constitutional guarantees. The argument must

be rejected for the same reason that we reject the argument as to the fairness of retroactive application of *Gion-Dietz*. We should not be required to continue stating the well-settled and well-known principle that the decisions of the California Supreme Court are binding on all other California courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

VII.

The Berks' Cross-Complaint for Damages Against Plaintiff Governmental Agencies.

By cross-complaints the Berk defendants sought, as one item of relief, damages in the event that the court upheld the plaintiffs' claims for public recreational easements. The claim for damages was posited on legal theories of unjust enrichment and inverse condemnation. We hold that the trial court erred in giving judgments against the Berks on their cross-complaints.

Although the evidence in the cases at bench was sufficient to establish public recreational easements pursuant to the rule of law set forth in *Gion-Dietz*, this rule of law is not to be interpreted to preclude liability of the plaintiffs — the governmental agencies — for loss caused to the defendants — the Berks, under the circumstances presented in the cases at bench. The findings by the trial court that the doctrines of estoppel and laches were not present to prevent the establishment of public easements by implied dedication do not preclude the right of the Berks to establish a cause of action for damages for losses occurring as the result of actions by the governmental agency plaintiffs.

We start with the principle that *Gion-Dietz* recognized a strong public policy favoring public use and public ownership of California's shoreline beach areas. "Even if we were reluctant to apply the rules of common law dedication

to open recreational areas, we must observe the strong policy expressed in the Constitution and statutes of this state of encouraging public use of shoreline recreational areas." (*Gion-Dietz, supra,* 2 Cal.3d 29, 42.) Although "[t]his court has in the past been less receptive to arguments of implied dedication when open beach lands were involved than it has when well-defined roadways are at issue," (*Id.* at p. 43), nevertheless, "[w]ith the increased urbanization of this state, however, beach areas are now as well-defined as roadways. This intensification of land use combined with the clear public policy in favor of encouraging and expanding public access to and use of shoreline areas leads us to the conclusion that the courts of this state must be as receptive to a finding of implied dedication of shoreline areas as they are to a finding of implied dedication of roadways." (*Id.* at p. 43.)

It was only two years after *Gion-Dietz* that the California Supreme Court in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, expressed an equally strong recognition of the court's "constitutional concern over property rights requires that the owner be compensated" *Klopping, supra,* 8 Cal.3d 39, 52) for damages caused by "unreasonable conduct" on the part of governmental agencies in the eminent domain arena. "[W]hen the condemner acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, *our constitutional concern over property rights* requires that the owner be compensated" *Klopping, supra,* 8 Cal.3d 39, 51-52; emphasis added) when "as a result of such action the property in question suffered a diminution in market value." *Id.* at p. 52; fn. omitted.)

This same constitutional concern over property rights" that necessitated "that the owner be compensated" in *Klopping* requires that the Berks, the owners before us, be com-

pensated for the losses suffered by them as a result of unreasonable conduct prior to'' *Klopping, supra,* 8 Cal.3d 39, 52) filing their actions against the property owners — the Berks — to assert public recreational easements against the Berks' property. For all intents and purposes, the recognition of a public easement against the Berks' beach property leaves the underlying fee interest *valueless*. There is no ability of the fee owner to make any economically valuable use of the property.

Although the Berks as fee owners are not entitled to compensation for the loss of a less-then-a-fee interest in their beach property because of the doctrine of an implied dedication of their property to the public for recreational use, they are not foreclosed from obtaining damages for losses substained as a result of ''unreasonable conduct'' by the governmental agencies prior to the institution of their actions to assert public-use easements.

The law cannot be sterile in the face of injustice. For the 13-month period from the date of *Gion-Dietz* to the filing of the instant actions, the officials of the cities of Torrance and Redondo Beach treated the property involved as the private property of the owners and dealt with the owners on a basis of the owner's right to develop the property within the framework of the applicable zoning and building ordinances of the respective cities. Had any of the city officials notified defendant Oscar Berk of the possibility that the *Gion-Dietz* rule of law might lead to the assertion of a public easement for recreational purposes, he would not have purchased the property from Halperin and sustained losses such as the down payment on the property, the expenses of escrow, the payment to the County of Los Angeles of taxes on the property and the expense of preliminary development of the project after obtaining a building permit.

The loss suffered by the Berks in the purchase of the property could have been averted also by prompt action after February 1970 — the date of the *Gion-Dietz decision — on the part of the City of Torrance, the City of Redondo Beach or the County of Los Angeles, in filing actions against the then owners to establish the public recreational easements prior to the Berks' purchase in July 1970.*

Under the circumstances presented here, the failure of the governmental agencies to act promptly after the *Gion-Dietz* decision constitutes "unreasonable conduct" sufficient to trigger a *Klopping*-type cause of action in the Berks to recover against plaintiffs City of Torrance and the County of Los Angeles damages for the losses sustained as a result of such "unreasonable conduct" by plaintiffs. The County of Los Angeles can claim no immunity on the theory that it was not dealing with the property owners after the *Gion-Dietz* decision. The County assessed and collected taxes from the owners on the basis that the owners had an unencumbered fee title to the property. In addition, the cities of Torrance and Redondo Beach must be considered as *sub-trustees* of the County of Los Angeles in terms of representing the public's interest in the property in question. (See *City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 493.)

It bears repeating that the City of Torrance filed its action against the Berks on March 12, 1971, and that the County of Los Angeles followed with its action on March 23, 1971. The County's lawsuit which related to the portion of the property situated in the City of Redondo Beach came after the City of Redondo Beach had given the Berks a permit to develop the property with residential units — a recognition by Redondo Beach that there were no impediments to an unencumbered fee title interest in the Berks. It appears, therefore, that the City of Redondo Beach was in no mood

to assert against the Berks an easement in favor of the public for recreational purposes on beach frontage property.

We fully recognize, however, that *Gion-Dietz* indicates that any person, private or governmental, may file an action as trustee for the public to establish a recreational easement created by implied dedication. But the County of Los Angeles in the cases at bench cannot be allowed to assert the public easement to the detriment of the Berks who dealt in good faith with the City of Redondo Beach which had the control over the development of property located within its boundaries. The County, representing the taxpayers, must be held to the principle that if it seeks the benefit of the *Gion-Dietz* rule of law, it must be responsible for the burden of doing equity to the Berks as property owners even though the acts of officials of Redondo Beach were responsible in part for the loss suffered by the Berks. But the County cannot be allowed to escape its share of the blame since it collected taxes on the Berks' property after *Gion-Dietz* and, also, through its tax assessor, assessed the market value of the property at $609,000, which was a substantial factor in causing the Berks to purchase the property and agree to pay the price necessary to make the purchase from Halperin, the then owner.

The minority opinion suggests that we have ignored the trial court's findings to the effect that the defenses of estoppel and laches were not established. We recognize the existence and validity of these findings but hold that their relevancy and applicability relate *only* to the issue of whether defendants have a defense against the plaintiffs' assertion of the public recreational easement interest in defendants' real property.

In the cases at bench, contrary to the view of the minority opinion, we consider it of no consequence that the conduct of public officials of Torrance, Redondo Beach and the

County of Los Angeles was not such as to come within the legal principles of an estoppel or laches since the *Klopping* cause of action is not predicated on the doctrines of estoppel or laches but on the fact that unreasonable delay or other oppressive or unreasonable conduct after pre-condemnation announcements has resulted in loss to the affected property owner. The same conduct of public officials which is insufficient to constitute the equitable defenses of estoppel or laches to preclude the assertion of a public recreational easement under *Gion-Dietz*, can amount to "unreasonable delay" or "unreasonable conduct" to provide the affected property owner with a cause of action for damages under the doctrine of *Klopping*.

Nor do we deem it material that the unreasonable conduct of the plaintiffs occurred before the Berk defendants had become owners of the property. We hold that plaintiffs had a duty to the Berks as prospective property owners *not* to engage in unreasonable conduct which would cause loss to them in the purchase of the beach property that was subject to a public recreational easement under the principles established by *Gion-Dietz*.

Under the special circumstances presented in the cases before us, we have no hesitancy in fashioning a remedy to preclude an injustice in the same way that the *Klopping* court fashioned a remedy for unreasonable conduct on the part of a governmental entity in the eminent domain area of the law. We cannot assume that the maxims of jurisprudence (Civ. Code, §§ 3509-3548) were enacted by the Legislature in 1872 as idle acts, intended to have no legal significance.

Two "maxims of jurisprudence" have especial significance for the problem presented by the instant cases. Civil Code section 3521 provides: "He who takes the benefit must bear the burden." Civil Code section 3543 provides:

"Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

Since plaintiffs' legal actions against the Berks were instituted to take advantage of the benefits bestowed on the public by virtue of *Gion-Dietz,* should not the concept of "bearing the burden" embodied in Civil Code section 3521 have required prompt action to prevent a needless loss to an innocent purchaser of beach property which, prior to the purchase, had become subject to the easement in favor of the public? Also, even assuming that the plaintiffs and the Berks were equally blameless in not being aware of *Gion-Dietz* and its potential effects — an assumption we do not make — it follows that Civil Code section 3543 comes into play to require the governmental agency plaintiffs to bear the loss caused by the act of Halperin in selling the property to the Berk defendants since the negligence of plaintiffs permitted the sale to happen to the detriment of the Berks.

We conclude that, on the cross-complaints of the Berks against the plaintiffs, City of Torrance and the County of Los Angeles, the Berks are entitled to recover as damages —not for any dimunition in the value of the property or loss of profits — but the sums they expended on the purchase price of the parcels involved, including items such as escrow expenses, taxes paid on the property and amounts expended on the start of the residential development before it was stopped through the issuance of a preliminary injunction in these actions.

The total loss to the Berks must be shared one-half by the City of Torrance and one-half by the County of Los Angeles as the several parcels of property were adjoining and all governmental agencies connected with the parcels were aware that the parcels had their greatest potential for development as a single piece of property.

The motion made by plaintiff County of Los Angeles to dismiss the appeals of the Berk defendants is denied.

That portion of each judgment that orders that cross-complainants Oscar Berk and Shirley Berk take nothing by their cross-complaint is reversed with directsion that the trial court shall award a judgment for damages in favor of said cross-complainants after a hearing and determination of the amount of damages in accordance with the views expressed in this opinion. Otherwise the judgments are affirmed.

Each party is to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION.

JEFFERSON (Bernard), *J.*

I concur:

KINGSLEY, *Acting P.J.*

ALARCON, *J.*—Concurring and Dissenting.

I concur in the judgment insofar as it affirms the judgment of the court below establishing public recreation easements on the property in dispute. I dissent from that portion of the opinion which holds that Shirley Berk, individually and as executrix of the estate of Oscar Berk, is entitled to recover damages on the cross-complaint.

The majority relies on *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, to tailor a remedy that suits their concern over the harsh result which must flow from an application of the *Gion-Dietz* concept to these facts. In *Klopping* the court stated that an owner of property must be compensated "... when the condemner acts unreasonably in issuing precondemnation statements, either by *excessively* delaying eminent domain action or by other *oppressive conduct* ... the property in question suffered a diminution in market value." (Emphasis added.) (Pp. 51-52.)

The majority has apparently concluded that the failure of the "city officials" to notify Oscar Berk of "the possibility that the *Gion-Dietz* rule of law might lead to the assertion of an easement for recreational purposes" (op. at p. 33) and the filing of the action to establish the public recreational easements 13 months after the *Gion-Dietz* decision was "unreasonable conduct" under *Klopping* as a *matter of law*.

The majority has not referred us to any case or statute which holds that any city official has a duty to furnish a legal opinion as to the possible consequences of a decision of an appellate court on title to real property. Here, the only "city officials" Mr. Berk spoke to were planning and building officials of the cities of Torrance and Redondo Beach. Assuming that these individuals were not members of the bar, any legal advice furnished by them to Mr. Berk would not only have been unsolicited and of dubious value but

also would constitute unethical and unauthorized practice of the law. The only official lawfully in a position to give an opinion as to the applicability of *Gion-Dietz* to the property in dispute was the City Attorney of Torrance who testified he was initially uncertain as to whether public easements could be asserted with respect to slopes and bluffs adjacent to sandy beach areas. The city attorney not only did not have a duty to communicate his uncertainty as to the requirements of the law to Mr. Berk (even had his views been solicited), he had no legal responsibility to communicate his doubts to members of the planning and building departments of the City of Torrance. To require a city attorney to tell responsible governmental officials he is unsure of the application of law would only serve to throw them into confusion and create paralyzing doubts as to their duties.

The trial court made express findings concerning the facts relating to the cross-complaint. The majority has failed to discuss findings or to point out why we are not bound by them.

The court found as follows:

"XIX

"That plaintiff had no actual knowledge of the state or condition of its title to an easement for itself and on behalf of the public and for the People of the State of California, in, on, over and across the real property described in Finding of Fact III and V for public recreational purposes at any time when any defendant acted to acquire any interest in any parcel of real property that is the subject of this action.

"XX

"That there was no representation, misrepresentation, conduct or act of the plaintiff or of any officer, employee

or agent of the plaintiff, to or toward any defendant or defendant's predecessor in interest upon which any defendant could rely to his or its detriment and that there was no reliance by any defendant on any representation, act or conduct of plaintiff or any officer, agent of employee thereof, nor was there any statement by, act or conduct of plaintiff, or officer or employee thereof with the intent to deceive any defendant or defendant's predecessor in interest nor was there culpable negligence on the part of plaintiff or any officer, agent or employee thereof to constitute fraud toward any defendant or defendant's predecessor in interest.

"XXI

"That this action was commenced by plaintiff in a timely fashion and without discrimination to any person or party."

It is bewildering that in the face of these findings the majority has not only concluded that it was unreasonable conduct for the plaintiffs and cross-defendants to fail to give unsolicited and unformulated legal advice, but also that 13 months constitutes an excessive delay in bringing an action to seek a court determination of questions of law which have remained unresolved until the filing of the opinion of this court. Under the circumstances presented here I am unable to conclude as a matter of law that the evidence presented at trial shows unreasonable conduct, negligence, or excessive delay on the part of plaintiffs or cross-defendants. I would commend not condemn the exercise of care and deliberate speed in the filing of an action to impose a public easement on private property. The majority point out that defendants would not have purchased the subject property had they been first advised of the existence and possible impact of the *Gion-Dietz* decision. The conclusion, therefore, that the plaintiffs engaged in excessive delay in bringing their action, indicates that had the action been filed one

day after the purchase of the property by defendants (only six months after the rendition of the *Gion-Dietz* decision), it would have been filed too late for plaintiffs to avoid liability under the novel remedy created by the majority in this matter.

Finally, it should be noted that in *Klopping* the Supreme Court required compensation when "as a result of such action the property in question suffered a diminution in market value." (*Id.* at 52.) The action referred to by the court consisted of precondemnation publicity followed by excessive delay in filing condemnation proceedings. It was the contention of the landowner in *Klopping* that the action of the government in announcing its intentions to condemn his property *prior* to the condemnation proceedings lowered his property value. In the instant matter the gist of the cross-complaint is the reverse of the *Klopping* facts. Here, the cross-complainants contend that the failure of the plaintiffs and cross-defendants to reach a decision concerning the property in dispute and to publicize that intention *failed* to diminish the value of the property prior to the purchase by the Berks.

The majority, in seeking to right what they characterize as an injustice, have turned the *Klopping* decision inside out and have found unreasonable conduct in the action of a thoughtful lawyer who was initially uncertain as to the scope of *Gion-Dietz* and failed to publicize his uncertainty. In my view, the city attorney acted responsibly and reasonably. It is not his conduct whcih has diminished the value of the property in question. It is the proper application of *Gion-Dietz* to these facts which makes the property virtually valueless. The determination which makes the property of little value is the result of the action of this court — not the plaintiffs or cross-defendants.

I would affirm the entire judgment.

ALARCON, *J.*

APPENDIX F. Judgment.

Superior Court of the State of California for the County of Los Angeles.

County of Los Angeles, etc., Plaintiffs and Cross-Defendants, vs. Oscar Berk, et al., Defendants and Cross-Complainants. NO. 999,043.

Filed: Feb. 23, 1973.

The above entitled action came on regularly for trial on May 8, 1972, plaintiff COUNTY OF LOS ANGELES, for itself and on behalf of the public, and as Trustee in Trust for the People of the State of California, appearing by John D. Maharg, County Counsel, by Charles Vinson Tackett, Deputy County Counsel, and Max E. Truex, Deputy County Counsel; Thomas M. Dankert and Stell and Levine, by Joseph Stell, appearing as attorneys for defendants OSCAR BERK and SHIRLEY BERK; Donnelly, Clark, Chase & Haakh, by John A. Donnelly, appearing as attorneys for defendant UNITED CALIFORNIA BANK; and evidence, oral and documentary, having been presented and considered, and the matter having been argued and submitted and Findings of Fact and Conclusions of Law being on file herein, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT as to Parcels 8, 9 and 1B as described in Exhibit "A" attached hereto, and incorporated by reference herein, the defendants OSCAR BERK and SHIRLEY BERK are the owners of the fee title and that UNITED CALIFORNIA BANK is beneficiary under a Deed of Trust dated September 28, 1970, encumbering said parcel of real property, and that said ownership and Deed of Trust encumbrance interest are subject to an easement in plaintiff COUNTY OF LOS ANGELES, for itself and on behalf of

the public, and as Trustee in Trust for the People of the State of California, in, on, over, and across said property for public recreational purposes and uses incidental thereto including but not limited to ingress, egress, viewing, strolling, walking of dogs, photography, painting, fishing, swimming, surfing, picnicing, sunbathing, beach games, bicycle riding and all other uses associated with beach and shoreline recreational areas, together with the right of plaintiff to provide life guarding, cleaning and sanitation activities and associated services, trash pickup and occasional erosion control on said Parcels 1B, 8 and 9, but not including the right of the County or the public to build any permanent structure thereon; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the title to said easement of plaintiff COUNTY OF LOS ANGELES, for itself and on behalf of the public, and as Trustee in Trust for the People of the Stateo State of California, be, and the same is hereby, quieted as against any claim of defendants, or any of them, inconsistent with said easement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, and each of them and their agents, servants, and employees, and all persons acting under, in concert with, or for them, are permanently enjoined from in any manner continuing to construct, commencing to construct, or actually undertaking construction of, that certain improvement commenced on Parcel 1B on or about March 14, 1970, and are permanently enjoined from constructing,building, or improving, on, under or ver, altering the subsurface of, or any act, or conduct that interferes with or obstructs the full and entire use, possession and enjoinment of the easement of the plaintiff COUNTY OF LOS ANGELES, for itself and on behalf of the public, and as Trustee in Trust for the People of the State of California, for beach

and recreational purposes in, on, over and across Parcels 1B, 8 and 9, by said plaintiff and the public for public recreational purposes and uses incidental thereto including but not limited to ingress, egress, viewing, strolling, walking of dogs, photography, painting, fishing, swimming, surfing, picnicing, sunbathing, beach games, bicycle riding, and all other uses associated with beach and shoreline recreational areas together with the right of plaintiff to provide life guarding, cleaning and sanitation activities and associated services, trash pickup and occasional erosion control on said Parcels 1B, 8 and 9.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Cross-Plaintiffs OSCAR BERK and SHIRLEY BERK take nothing by their Cross-Complaint from Cross-Defendant COUNTY OF LOS ANGELES.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff COUNTY OF LOS ANGELES have and recover from defendants costs and disbursements amounting to the sum of $1,980.69.

DATED: Feb. 23, 1973.

/s/ R.S. Schauer
Judge of the Superior Court.

APPENDIX G. Judgment.

Superior Court of the State of California, for the County of Los Angeles.

City of Torrance, etc., Plaintiffs and Cross-Defendants, v. Oscar Berk, et al., Defendants and Cross-Complainants. No. SW C 19574 (Transferred).

Filed: Feb. 23, 1973.

The above-entitled action came on regularly for trial on May 8, 1972, plaintiffs appearing by Stanley E. Remelmeyer, City Attorney, by A. D. "Jack" Allen, Jr., Deputy City Attorney, as attorneys for plaintiff City of Torrance, a municipal corporation, for itself and on behalf of the Public and as Trustee in Trust for the People of the State of California; John D. Maharg, County Counsel, by Charles Vinson Tackett, Deputy County Counsel, and Max E. Truex, Deputy County Counsel, as attorneys for plaintiff County of Los Angeles, for itself and on behalf of the Public, and as Trustee in Trust for the People of the State of California; Thomas M. Dankert and Stell and Levine by Joseph Stell appearing as attorneys for defendants Oscar Berk and Shirley Berk; Donnelly, Clark, Chase & Haakh by John A. Donnelly, appearing as attorney for Defendant United California Bank; Davidson, Baker & Davidson by H. W. Davidson appearing as attorneys for Fidelity Federal Savings and Loan and Gateway Mortgage Corporation; Fullop, Rolston, Burns and McKittrick by Morton G. Rosen appearing as attorneys for defendant J. Halperin & Company and John Halperin, and evidence, oral and documentary, having been presented and considered, and the matter having been argued and submitted and Findings of Fact and Conclusions of Law being on file herein, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT defendants Oscar Berk and Shirley Berk are

the fee owners of the property described as Parcel T in Exhibit A attached hereto, and incorporated by reference herein, and that Fidelity Federal Savings and Loan Association is beneficiary under Deed of Trust dated August 12, 1970, encumbering said parcel of real property, and that John Halperin is beneficiary under a Deed of Trust dated August 12, 1970, encumbering said real property and that said fee ownership and Deeds of Trust encumbrance interests are subject an easement in plaintiff City of Torrance, for itself and on behalf of the Public, and as Trustee in Trust for the People of the State of California, in, on, over and across said property for public recreational purposes and uses incidental thereto, including, but not limited to, ingress, egress, general viewing, strolling, picnicking, public protection and policing, erosion control and maintenance and cleaning, but not including the right of the City or the Public to build any permanent structure thereon.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the title to said easement of plaintiff City of Torrance, for itself and on behalf of the Public, and as Trustee in Trust for the People of the State of California, be, and the same are hereby, quieted as against any claim of defendants, or any of them, inconsistent with said easement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT defendants, and each of them and their agents, servants and employees, and all persons acting under, in concert with, or for them, are permanently enjoined from constructing, building, or improving on, under or over, altering the sub-surface of, or any act, or conduct that interferes with or obstructs the full and entire use, posession and enjoyment of the easement of the plaintiff City of Torrance, for itself and on behalf of the Public, and as Trustee in Trust for the People of the State of California, and the public, and by said plaintiff and the public in, on, over and

across the property described as Parcel T in Exhibit A, for public recreational purposes and uses incidental thereto, including but not limited to ingress, egress, general viewing, strolling, public protection and policing, erosion control and maintenance and cleaning.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT cross-plaintiffs Oscar Berk and Shirley Berk take nothing by their cross-complaint from cross-defendant City of Torrance.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT plaintiff City of Torrance have and recover from defendants costs and disbursements amounting to the sum of $278.95.

DATED: Feb. 23, 1973.

/s/ R.S. Schauer
Judge of the Superior Court.